VOLUME V

(Pages 1922 to 2027)

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 348

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ETC., PETITIONER,

vs.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND IVY BAKER PRIEST, TREASURER OF THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 6, 1957

CERTIORARI GRANTED OCTOBER 14, 1957

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(1923)

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13,460 and 13,527

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., etc., *Plaintiff*,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alient Property Custodian, etc., et al., *Defendants*.

Appeal from the United States District Court for the District of Columbia

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JOINT APPENDIX

(1924)

Filed June 20, 1956

IN THE UNITED STATES DISTRICT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4360-48

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., etc., *Plaintiff*,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, etc., et al, *Defendants*.

Motion for Extension of the Time Allowed in Modification of Affirmance of Dismissal Order

Comes now the plaintiff-appellant, by its undersigned attorneys, and moves the Court to extend the time which has been allowed it to make discovery in order to avoid the dismissal of its action.

On June 30, 1955, the United States Court of Appeals affirmed the District Court's order of dismissal with prejudice in an opinion (96 U.S. App. D.C. 232, 225 F. 2d. 532, Cert. denied——U.S.——, 100 L.Ed. (Advance Reports) 184) which concluded with the following modification (p. 243):

> "One modification, however, we deem advisable, namely, that dismissal of the complaint with prejudice shall not become effective until six months after the receipt by the District Court of the mandate of this court in this case, and not then if within such period discovery is made as ordered. This will afford another opportunity to bring the case on for a trial and decision on the merits."

The judgment of the United States Court of Appeals upon its opinion provides as follows:

(1925)

1925

"On consideration whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed, provided, however, that if within six months after the receipt by the District Court of the mandate of this Court in this case discovery shall be made *as required by the District Court,* then the order dismissing the complaint shall be vacated by the District Court." (Emphasis supplied)

2 Petition for rehearing in the United States Court of Appeals and petition for certiorari in the Supreme Court (denied—— U.S. ——, 100 L.Ed. (Advance Reports) 184) resulted in the mandate of the United States Court of Appeals not being filed in the District Court until January 24, 1956. The six months allowed in the foregoing expires on or about July 23, 1956.

Up to the time of the dismissal, plaintiff-appellant had been able to produce about 63,000 documents* belonging to the Sturzenegger Bank. After the exhaustion of its appellate recourse, plaintiff-appellant resumed its efforts to produce the documents called for by the District Court's

3 order.** Up to last Friday, about 90,000 additional

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* See p. 235 of 96 U.S. App. D.C. (p. 535 of 225 F. 2d.).

** The idea has been allowed to creep into this case that *all* the Bank's records must be produced. Despite Chief Judge Laws' statements in his memorandum opinion of June 23, 1949, (J.A. 335-338), his order of July 5, 1949 (J.A. 339-342) specifically limits the scope of the discovery and contains no language expressing the idea that "every record" is embraced within its requirements. See the following quotation from Chief Judge Laws' order (J.A. 340):

"IT IS FURTHER ORDERED, that the motion of defendants to order plaintiff to produce for inspection * * * *all* documents* * * *relevant* to the issues in this case be, and it hereby is, *granted in the following respects* and subject to the following conditions:

"1. That plaintiff shall produce and permit the inspection, copying or photographing *of the following* documents of I.G. Chemie and H. Sturzenegger & Cie.: (a) The *some* 700 jackets and 140 account books on the premises of I.G. Chemie and H. Sturzenegger & Cie., examined in the course of the investigation of the German character

documents have been obtained and transported to the office of the undersigned counsel, making a total so far of 154,275.* The details are set forth in the accompanying affidavit of John J. Wilson, one of counsel for plaintiff-appellant.

The accounts, persons, firms, corporations and other entities listed in the accompanying affidavit are amongst those in which counsel for the defendants-appellees expressed an interest in the course of the "good faith" proceedings before the Special Master. (See J.A. 721-736). Obviously, the interest was in having plaintiff produce records of the Bank pertaining to them. Thus, the production of these documents is in compliance with the discovery order.

Counsel are advised that efforts are being continued to procure additional records, and that it is expected that many more will be obtained.

Plaintiff-appellant respectfully submits that this very

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of I.G. Chemie by investigators of the Swiss Compensation Office in 1945 and 1946." (Emphasis supplied.)

The phrase "some 700 jackets and 140 account books," mentioned in the order, is derived from the report of the investigators of the Swiss Compensation Office, in which the following appears (J.A. 235):

"In the search of documents which might help the investigation at this time the following documents were examined:

	I.G. Chemie	Sturzenegger & Company	Affiliated companies and persons (other investigations)
Dossiers about	250	450	70
Containing files about	23,000	55,500	2,000
Account books	30	110	25".

At the appropriate time, upon the question of compliance, it doubtless will be necessary to determine which documents are embraced within the discovery order.

* In footnote 17 on page 243 of 96 U.S. App. D.C. (225 F. 2d 543), the United States Court of Appeals stated:

"17. We speak of discovery in general terms, since there is no reason to think that the District Court will require actual production in the United States if other arrangements, such as for inspection or copying in Switzerland, can reasonably be made."

(1927)

large production** demonstrates its good faith efforts to comply with the court's order, and that it is only fair to extend its time to continue such efforts.

Plaintiff-appellant is uncertain whether this motion and accompanying affidavit should be submitted to the United States Court of Appeals or to the District Court, and accordingly identical papers are being filed in each court. It is believed, based upon footnote 17 in the Court of
4 Appeals' opinion and the language of its judgment, *supra*, that the United States Court of Appeals contemplated a broad latitude in the District Court in relation to the modification of the dismissal order. On the other hand, it might be felt that further extensions beyond the six-months' period can be allowed only by the United States Court of Appeals.

(Signatures of Attorneys for Plaintiff-Appellant)

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5 Filed June 20, 1956

Affidavit to Accompany Annexed Motion for Extension of Time

DISTRICT OF COLUMBIA, ss:

I, John J. Wilson, one of the attorneys for the plaintiff-appellant in the above-entitled proceeding, being first duly sworn, on oath depose and state as follows:

That prior to the order of dismissal entered by the District Court, I had in my possession approximately 63,692 papers, records and documents of the Greutert/Sturzenegger Bank, described in the affidavit of my assistant, Peider Konz, filed in the District Court on October 16, 1953, and

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** Such production entails a great amount of time and effort, the details of which are described by Swiss counsel in his affidavit (filed July 14, 1953) at page 659 of the Joint Appendix.

(1928)

19

appearing at pages 668-670 of Volume II of the printed Joint Appendix on appeal, and such documents are still in my possession.

That since the mandate of the United States Court of Appeals was filed in the District Court and up to June 15, 1956, I have received from Switzerland additional records of said Bank of the quantity of approximately 90,583, so that I now have in my possession in the District of Columbia approximately 154,275 records of said Bank.

That lists prepared in Switzerland and submitted to me, describing the files which contain the said 90,583 documents, disclose that said documents respectively are addressed to or received from, or pertain or relate to, or mention or involve the following named accounts, persons, firms, corporations and other entities, or respective affairs and transactions thereof:

Metallgesellschaft
Deutsche Landerbank A.G.
Agfa-Photo Aktiengesellschaft
Rudolf Euler
Fritze/Greutert Konsortium
Furrer Heinrich
I. G. Chemie
Norsk Hydro
N. V. Chemische Mij. "Nitropan", Amsterdam
N. V. Montaan Metaalhandel, Amsterdam
Scharrer, Dr. Jur. J. H.
Sekretariat
Sekretariat "A"
Sekretariat "B"
Sekretariat Chemie
Sekretariat "C"
Sekretariat "D"
Sekretariat "G"
Sekretariat "R"
Sekretariat "S"
Traudes, Rechtsanwalt

(1929)

1929

Schweiz. Gesellschaft fur Metallwerte
Eidgenössische Bank A.G.
Hochofenwerk Lubeck A.G.
Schweiz. Kreditanstalt (Credit Suisse)
Schweiz. Bankverein (Swiss Bank Corporation)
I. G. Farbenindustrie
Farbwerke vorm. Meister Lucius & Bruning, Hoechst
7 Den Norske Creditbank
Hans Haller
Carlo Mollwo
Walter Germann
Christiania Bank og Kreditkasse
Chemische Fabrik Rohner A.G.
Karl Cassani
Badische Anilin & Soda-Fabrik
Mithras A.G.
Metallwerte-Aktien-Konsortium
Dr. Felix Iselin
Industrie Bank A.G.
I.G. Farben-Aktien-Konsortium
Dr. K. Grieshaber
Dir. A. Gerinann
Eduard Greutert
Dr. Gottfried Keller
Interventions-Konsortium "A"
Interventions-Konsortium "B"
Bezugsrechte-Konsortium
I. G. Bonds-Konsortium
I.G. Chemie-Konsortium
Effekten-Kauf-Konsortium
Heydtkontor
Rigidor A.G.
Perpetua A.G.
B. Werder
Dr. H. Sturzenegger
Elbe-Konsortium
N.V. Defa Mij. voor Verfstoffenhandel

(1930)

Grutchemie-Konsortium
"Chemo" Mij. etc., Amsterdam
8 Dr. J. Auer
Prof. Dr. C. Duisberg
Fritz Brumm
Fiduziar-Gesellschaft
Josef Bischof
Dr. Walter Duisberg
Reinhard Sutter
Bank f. elektr. Unternehmungen
Carl Roesch
D. A. Schmitz
Dir. Th. Wolfensperger
D. R. Anleihe-Konsortium
Dr. G.C. Du Bois
Ammoniakwerk Merseburg GmbH
Ahrens & Co.
B. R. Konsortium
5½% Americ. I.G. Chemical Deb. Konsortium
I. G. Dyestuffs Ltd., Manchester
Agfa-Ansco Shares Konsortium
Basil Werder
Teerfarben A.G.
Dr. Carl von Weinberg
Rotopulsor A.G.
Ruckstellungskonto Secretariat
R. P. Konsortium
Sekretariat-Konto Chemie
Suspens-Konto Visca.A. G.
Romanil S.A.
D. A. Schmitz
Osmon-Werke A. G.
9 I. G. Stickstoff
Durand & Huguenin A. G.
Dr. Jur. Hans Schudel
Syndikats-Konto I. G. Chemie-Aktien
Sils-Konsortium
(1931)

I. G. Chemical-Konsortium
Dr. Alfred Merton
Soc. des Etabl. Chimiques Winnica
Alfred Sidler
William H. vom Rath
I. G. Konsortium
Parta S. A.
Meinich Olsen
N. V. Hollandsche Koopmansbank
N. V. Expeditie Mij. "Delta"
N. V. Mij. voor Industrie en Handelsbelangen
Pickering L. D. & Co.
General Aniline & Film Corp.
Visca-Konsortium
Nostro-Sekretariat
Interest-Account in francs
Visca A. G., Schaffhausen
V. A. Konsortium
V. R. Konsortium
Charles Thormann
Schweiz. Ges. fur Metallwerte, Basel

/s/ JOHN J. WILSON

Subscribed and sworn to before me this 20th day of June, 1956.

/s/ VERA McG. SIMPSON
Notary Public, D. C.

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10 Filed June 26, 1956

Defendants' Memorandum in Opposition to Plaintiff's Motion for Extension of the Time Allowed in Modification of Affirmance of Dismissal Order.

Defendants, by their undersigned attorneys, oppose plaintiff's motion for an extension of the six months' period of time allowed by the judgment of the Court of Appeals for compliance with this Court's production order of July 5,

1949. Plaintiff, on June 20, 1956, simultaneously filed the motion for an extension in this Court and a motion for leave to file the identical motion in the Court of Appeals, stating that it feels uncertain whether this Court or the Court of Appeals has the power to grant any extensions of the six months' period.

Defendants are opposed to the grant of any extension and also take the position that only the Court of Appeals, not this Court, has the legal power to grant an extension. There is attached as Exhibit A a copy of our memorandum, together with an accompanying affidavit, filed today in the Court of Appeals, in which we oppose defendant-appellant's motion for leave to file its motion for extension, for the reason that the motion shows on its face its lack of merit.

The judgment of the Court of Appeals in this case reads as follows:

> "On consideration whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed, provided, however, that if within six months after the receipt by the District Court of the mandate of this Court in this case discovery shall be made as required by the District Court, then the order dismissing the complaint shall be vacated by the District Court."

This unequivocal language of the judgment of the Court of Appeals makes it clear, we believe, that the six months' period was fixed definitely by the Court of Appeals and, under well-established principles of law, this Court therefore has no power to modify the determination of the Court of Appeals. *Durant* v. *Essex Co.*, 101 U.S. 555, 556 (1879); *Butcher & Sherrerd* v. *Welsh*, 206 F. 2d 259, 262 (C.A. 3, 1953), cert. denied 346 U.S. 925 (1954); *Thornton* v. *Carter*, 109 F. 2d 316, 320 (C.A. 8, 1940); see *Work* v. *Read*, 57 U.S. App. D.C. 312, 23 F. 2d 139 (1927).

Plaintiff quotes footnote 17 of the Court of Appeals' opinion

"We speak of discovery in general terms, since there is no reason to think that the District Court will require actual production in the United States if other arrangements, such as for inspection or copying in Switzerland, can reasonably be made." (96 U.S. App. D.C. 232, 243; 225 F. 2d 532, 543)

and argues therefrom and from the language of the judgment speaking of discovery "as required by the District Court" that the Court of Appeals may have granted "broad latitude" to the District Court "in relation to the modification of the dismissal order." But it is obvious that the only latitude granted by footnote 17 of the opinion of the Court of Appeals concerns the locale of the production. The judgment granted no latitude whatever; its reference to the production "as required by the District Court" merely describes the scope of the production previously ordered. Clearly, the issue as to time was determined by the Court of Appeals, thereby taking it "out of the reach of the trial court." *Thornton* v. *Carter, supra*; *In re Sanford Fork and Tool Company*, 160 U.S. 247 (1895).

It is respectfully submitted that the motion of plaintiff be denied.

June 26, 1956

(Signatures of Counsel for Defendants

(1934)

28 Filed June 28, 1956

Memorandum

"Plaintiff has filed a motion in this Court to extend the time allowed by the Court of Appeals for the District of Columbia Circuit in affirming this Court's dismissal order.

"On December 21, 1953, this Court dismissed plaintiff's complaint for failure to comply with its order of July 5, 1949, compelling discovery of certain documents. In affirming the Court of Appeals stated:

> '. . . provided, however, that if within six months after the receipt by the District Court of the mandate of this Court in this case discovery shall be made as required by the District Court, then the order dismissing the complaint shall be vacated by the District Court.'

"This Court is of opinion that it should not increase or otherwise modify the order of its Appellate Court and accordingly such motion to enlarge the time is denied."

BOLITHA J. LAWS
Chief Judge

June 28, 1956

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29 Filed July 11, 1956

Order

Upon consideration of plaintiff's motion dated June 20, 1956, for an extension of the time allowed by the Court of Appeals in affirming the dismissal order of this Court, and upon consideration of defendants' memorandum in opposition thereto, dated June 26, 1956, it is hereby this 11th day of July, 1956,

ORDERED that the motion of plaintiff be, and it hereby is, denied.

BOLITHA J. LAWS
Chief Judge

Seen: Also note that requested
oral hearing not granted
Attorney for Plaintiff
(1955)

30 Filed July 14, 1956

Motion by Plaintiff for Reconsideration of Order Denying Motion for Extension of the Time Allowed in Modification of Affirmance of Dismissal Order

Comes now the plaintiff, by its undersigned attorneys, and moves the Court (Chief Judge Laws) for reconsideration of its order dated July 11, 1956, predicated upon the Court's memorandum dated June 28, 1956, denying plaintiff's motion for extension of the time allowed in modification of affirmance of dismissal order.

In support of this motion, plaintiff annexes hereto copies of its Reply Memorandum and supporting affidavit and of its Supplemental Memorandum, all filed in the United States Court of Appeals. Defendants are invited to submit copies of their opposing memorandum, also filed in the United States Court of Appeals.

Also in support of this motion, plaintiff files the annexed affidavit of John J. Wilson, one of its attorneys, disclosing that 15,841 additional documents have just arrived in this Country from Switzerland, bringing the grand total of produced documents to 191,742. More documents are expected to be produced.

With full knowledge of the action taken by this Court in its decision of June 28, 1956, since this Court's memorandum of that date was included in plaintiff's Reply Mem-
31 orandum filed in the United States Court of Appeals on July 3, 1956, the United States Court of Appeals on July 12, 1956, denied plaintiff's motion filed therein for leave to file its motion for extension of time allowed in modification of affirmance of dismissal order, with the proviso that such denial is without prejudice to plaintiff's *right* to file a motion in this Court for such extension.

The effects of said order of the United States Court of Appeals are submitted to be as follows:

(1) That this Court has jurisdiction and power to grant an extension of time upon the motion of plaintiff filed herein June 20, 1956.

(1936)

(2) That plaintiff has a *right*, as a matter of law, to file a motion in this Court for an extension of time.

(3) That this Court should reconsider its action in denying plaintiff's motion by memorandum dated June 28, 1956, and by order dated July 11, 1956.

(4) That plaintiff's motion *prima facie* has merit and is not frivolous, and deserves this Court's further consideration.

(5) That the circumstances presented by the motion are such that it cannot be said, as a matter of law, that plaintiff is not entitled to an extension.

The production that plaintiff has been able to make is enormous. Plaintiff has been diligent and has acted in good faith. Clearly the motion is not filed for the purpose of delay. If the plan, or even part of it, outlined in plaintiff's supplemental memorandum filed in the United States Court of Appeals, is allowed to be carried out, there is a likelihood that full compliance may be effectuated.

Plaintiff is entitled to an oral hearing upon this motion, and hereby requests it. Rule 9(f) of the Local Civil Rules of this Court would constitute a deprivation of procedural due process if it should be applied in this instance to deny plaintiff the opportunity for an oral hearing upon this motion. It was never the intention of such Rule to deprive a party of an oral hearing under the present circum-
32 stances. Moreover, the very nature of this application contemplates an oral hearing as a matter of right.

WHEREFORE, plaintiff moves the Court to extend the time for a reasonable length within which discovery may be made and the order dismissing the complaint may be vacated. (See Rule 6(b) of the Federal Rules of Civil Procedure.)

(Signatures of Attorneys for Plaintiff-Appellant)

(1937)

33 Filed July 14, 1956

Additional Affidavit in Support of Motion for Extension of Time

DISTRICT OF COLUMBIA, ss:

I, John J. Wilson, one of the attorneys for the plaintiff-appellant in the above-entitled proceeding, being first duly sworn, on oath depose and state as follows:

That I make this affidavit to supplement my affidavits dated June 20, 1956 and July 3, 1956.

That today, July 13, 1956, I received notification that 15,841, additional Greutert/Sturzenegger Bank documents have been received in this Country by air freight from Switzerland. These will bring the total of released Bank records to 191,742; and I have been informed that more documents are expected to be obtained.

That, according to the lists sent to me, in relation to these 15,841, said documents respectively are addressed to or received from, or pertain or relate to, or mention or involve many of the accounts, persons, firms, corporations and other entities, or their respective affairs and transactions, whose names have heretofore been listed in affidavits.

JOHN J. WILSON

Subscribed and sworn to before me this 13th day of July, 1956.

Notary Public, D. C.

(1938)

Filed July 14, 1956

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12140

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., etc., *Appellant*,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., *Appellees*.

Appellant's Reply to Appellees' Memorandum in Opposition to Appellant's Motion for Extension of Time.

It is obvious from appellees' Opposition that they do not contest appellant's statements in its motion for an extension of time that the District Court's order does not require production of *all* the Greutert/Sturzenegger Bank records. At the proper time, the District Court will doubtless have to hold a hearing on the question of compliance.

This Court allowed appellant six months within which to attempt to comply with the order, whatever its scope may be. In less than that time appellant has been able to produce 90,583 documents, 21,624 more are on their way—see the accompanying affidavit, and still more are expected. Word is awaited from Switzerland as to the possibility of a solution regarding the books of account.

Appellant submits that it has demonstrated its good faith efforts and should be granted such additional time as the Court may see fit to allow.

35 Appellant filed identical motions in the District Court and in this Court. Appellees opposed the motion filed below upon the ground that the District Court

"has no power to modify the determination of" this Court. Without allowing oral argument, Chief Judge Laws denied appellant's motion on June 28, 1956, in a memorandum, copy of which is as follows:

> "Plaintiff has filed a motion in this Court to extend the time allowed by the Court of Appeals for the District of Columbia Circuit in affirming this Court's dismissal order.
>
> "On December 21, 1953, this Court dismissed plaintiff's complaint for failure to comply with its order of July 5, 1949, compelling discovery of certain documents. In affirming the Court of Appeals stated:
>
> '. . . provided, however, that if within six months after the receipt by the District Court of the mandate of this Court in this case discovery shall be made as required by the District Court, then the order dismissing the complaint shall be vacated by the District Court.'
>
> "This Court is of opinion that it should not increase or otherwise modify the order of its Appellate Court and accordingly such motion to enlarge the time is denied."

Appellant's Efforts

Appellant has, so far, brought about the release of over 175,000 records of the Greutert/Sturzenegger Bank.

About 63;000 documents were released before the dismissal in December, 1953. The balance have been released after January 24, 1956, when this Court's mandate was filed in the District Court.

Appellant is criticised by appellees for having done nothing between December, 1953 and January, 1956. Such criticism is not justified under the circumstances.

With the case actually dismissed, and the District Court refusing further extensions to obtain documents, nothing was left for appellant to do but to prosecute its appellate recourse, which it did diligently and without delay. This Court very carefully fixed the six months to begin after its mandate should be filed below in order to give ap-

(1946)

36 pellant the opportunity to seek review of this Court's decision by the Supreme Court. Appellant's counsel considered this Court's opinion to be both erroneous and novel, and that its petition for certiorari came within one or more of the reasons indicated by the Supreme Court for the granting of such writs.

In the face of uncertainty as to whether the decision of this Court would become the final law of this case, appellant submits that it was not reasonable to resume the task of seeking the release of further documents until after the Supreme Court had acted.

As to the general charge by appellees of allegedly delaying tactics on the part of appellant,* attention is called to the following: Performance by appellant was due in the summer of 1950; appellees moved to dismiss in October 1950; Judge Laws ordered an inquiry by the Special Master in February, 1951; pursuant thereto, hearings, arguments, briefing, reports, exceptions and more hearings culminated in Judge Laws' determination to dismiss in February, 1953, subject to allowance of time for compliance until November, 1953, during which about 63,000 documents were tendered appellees for inspection; and appellate procedures were pursued from then until January, 1956. Appellant challenges both the fairness and the accuracy of an insinuation that it has been responsible for the time which has been consumed.

Delay In Sale of Stock

On page 6 of their memorandum, appellees mislead the Court by the assertion that the vested property cannot be sold "so long as the suit pends". The truth of the matter is that the intervenors' proceedings** which undoubtedly will

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* Appellees state at the bottom of page 6 of their memorandum that "appellant has succeeded for years in postponing compliance with the production order."

** See reference to these proceedings in this Court's opinion, p. 235 of 96 U.S. App. D.C.; page 535 of 225 F. 2d.

(1941)

1911

go on for years to come—have the same staying effect under the statute. (50 U.S.C. App. 9a.)

37 THE 124 NAMES

Appellees have described to some extent the circumstances under which those names were mentioned. For one reason or another these names had become well known to both sides of the case. They undoubtedly encompass all the chief "characters in the play", and others of lesser importance and relationship, as well as some with a minor or no substantial connection. It seemed to the undersigned that these names were fairly inclusive.

With several exceptions, ones on that list have either waived banking secrecy or there are no papers relating to them. The efforts now chiefly concern "secondary" waivers, i.e., obtaining waivers from third persons named or involved in the transactions. They, too, must waive under Swiss law. This is the reason why the same name may appear in the Konz affidavit at Joint Appendix 668-670 and in the Wilson affidavits of June 20, 1956 and July 2, 1956. For instance, Farben will appear in all three. This is due to the fact that some papers relating to Farben may be released by reason of some "secondary" waivers, while others require different ones.

Appellees say that 31 names on the list in the Wilson affidavit of June 20, 1956, relating to "Sekretariats" and "Konsortia", represent only one name in their "124". That may be so, but they fail to point out to the Court that they have frequently claimed that such accounts in the Bank, if revealed, would be an important source of information to them. Now that they *are* available, an entirely different reaction is displayed by appellees.

In both the opposing memorandum and in the accompanying affidavit, appellees state that they have found over 50 additional names which they regard as relevant to the case. Promptly, on June 27, 1956, the undersigned asked appellees' counsel for those names, and on the next day the

(1942)

request was declined.* Appellees' letter ended with the question—

> "Do I take your offer to solicit waivers from additional customers listed by us as an admission that your client has not heretofore solicited waivers from all persons whose waivers would be required for a full compliance with the District Court's order?"

In the language of the appellees. This is a plain *non sequitur*.** Are these 50 names "additional customers" of the Bank? Does the Bank have any documents pertaining to them? Are they covered by Judge Laws' order? What is "full compliance", Mr. Hill?

Again, we request appellees to give us the list to which they have referred.

Attention is called to the Wilson supplementary affidavit accompanying this Reply, in which are set forth, in connection with documents relating to Farben, many names that are not included in appellees' "124". Clearly, the efforts have not been so limited.

* * * * * * * * * * *

Comment should be made regarding the footnote on page 4 of appellees' Opposition. Appellees seek to make indefinite and uncertain the quantity of documents called for by Judge Laws' discovery order. They refer to the phrase "dossiers about . . . 450 . . . containing files about 55,000".*** They state inaccurately and misleadingly that "Mr. Sturzenegger himself explained that one 'file' in a dossier may consist of a *collection of documents*", (underscoring supplied), and cite R. 6630-1 in support of their statement.

The record citation may be found at page 806 of the Joint Appendix. We quote the relevant portions as follows:

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* See letters attached to affidavit accompanying this Reply.

** See p. 5, appellees' opposing memorandum.

*** See footnote on page 2 of appellant's motion for the source of these figures.

"Q. [By appellees' counsel] So we might call a dossier a file jacket, this brown thing I hold up (indicating)? We call it a file jacket.

"A. [By Mr. Sturzenegger] Yes.

"Q. And the files that they say—they say 250 dossiers contained 23,000 files. By 'files' our translator is no doubt referring to a word that means one piece of paper.

"A. One piece of paper or—it is a phrase I don't know—maybe two or three pieces are just—

39 "Q. —clipped together?

"A. —clipped together, and that might be so in my opinion."

It is interesting to see how appellees dealt with this question in their brief in this Court on appeal. See footnote 4 on pages 19-20 of appellees' brief. There, they literally refer to Mr. Sturzenegger's estimate of a file consisting of two or three papers clipped together. Since appellant at that time had been able to produce only 63,000 documents, it was safe for appellees to depend upon Mr. Sturzenegger's language because 55,500 multiplied by two or three would considerably exceed the quantity produced. But when, from appellant's motion, it was disclosed that almost 155,000 documents were available, and more were to come, multiplying 55,500 by three—166,500—would bring the quantity dangerously close to Judge Laws' designation as interpreted by appellees' counsel and Mr. Sturzenegger at the time that the latter's deposition was being taken.

Therefore, appellees now employ the phrase "collection of documents", which is no where to be found in the record, nor reasonably to be inferred from what Mr. Sturzenegger stated in the above-quoted answer.

It is respectfully hoped that the Court will allow a further extension of time.

(Signatures of Attorneys for Plaintiff-Appellant)

(1944)

Filed July 14, 1956

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12140

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., etc., *Appellant*,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., *Appellees*.

Supplementary Affidavit in Support of Motion for Extension of Time

DISTRICT OF COLUMBIA, ss:

I, John J. Wilson, one of the attorneys for the appellant in the above-entitled proceeding, being first duly sworn on oath depose and state as follows:

That I make this affidavit to supplement my affidavit dated June 20, 1956.

That on Saturday, June 30, 1956, I received notification that on June 27, 1956, 21,624 additional Greutert/Sturzenegger Bank documents had been dispatched by air freight to me. These will bring the total of released Bank records to 175,900, 112,208 of which have been released since the mandate of this Court was filed in the District Court on January 24, 1956.

That I have been informed that more documents are expected to be obtained; and I am now awaiting word from Switzerland as to whether a solution is possible regarding the books of account of the Bank.

41 That, according to lists sent me, there are contained in the 21,624 documents now en route, over 11,000 pertaining to I. G. Farben, the details of which, according to such lists, are as follows:

(1945)

Current correspondence 1927/33
Current correspondence 1933/34
Current correspondence 1934
Current correspondence 1934/37
Current correspondence 1937
Current correspondence 1937
Current correspondence 1937
Current correspondence 1938
Current correspondence 1938
Ruckburgschaft w/Ethyl Export Co.
Soc. p. l'Importation de Matières Colorantes
North American Industries Ltd.
Diverses
Kommissionweise Uebernahme von Stillhalteforderungen
Bayer. Stickstoff-Werke A.G.
Ruckzahlung eines Darlehens
Bornhauser Liquidation
Kredit der Bque de Paris et des Pays-Bas
"Titanit" A.G., Zagreb
K. Lissman, Wiesbaden
Kauf von Gesellschaftsanteilen
Friedichshall-Kali-Aktien
Metalgesellschaft/Pensionen
Forderung an Deka w/Vornhauser
Stillhaltekredit Fr. 958,366.30
Kredit Waegelein Hch., Munchen
Juganil K.D., Belgrad
Chem. Fabr. Rohner A.G., Pratteln
42 Bulgarische Nationalbank, Sofia
Kompensation Basel/Berlin
Kredit L. Cassella & Co., Frankfurt
Kredit Ozalid Corp., New York
Albert Richter
Kompensation Basel/Berlin
Dr. Rene Bohn
Gasolin/Tefiag

(1946)

Rohstoffkredit Fr. 500,000.
Kredit Dr. Wagner's Nachlass
Burgsch. w/Juganil K.D., Beograd
Burgsch. w/Anilinchemie AG, Wien
Burgsch. w/G.M. Schlagdenhaufen, Wien
I.G. Chemie
Synthetic Nitrogen Products
Current Correspondence 1927/40
Current Correspondence 1940/41
Current Correspondence 1941
Current Correspondence 1942/44
Current Correspondence 1938
Current Correspondence 1938
Current Correspondence 1938
Current Correspondence 1938/39
Current Correspondence 1939
Current Correspondence 1939
Current Correspondence 1939
Current Correspondence 1939/42
Current Correspondence 1942/45
Current Correspondence 1929/38
Current Correspondence 1938/43
Current Correspondence 1926/28
43 Current Correspondence 1924/44
Current Correspondence 1929/39
Current Correspondence 1925/41
Current Correspondence 1926/29
Current Correspondence 1929/40
Chow Chang Liang
Establ. Chimiques de Winnica
Athanil A. G.
Soc. p. l'Importation de Matières Colorantes etc.
N.V. Expeditie Mij. "Delta"
Karl Riesenfeld GmbH.
Caro, Geh. Regierungrat
Vorschuss-Kto. Englert & Becker
Gans/Weinberg, Frankfurt a.M.
(1947)

Investira S.A., Lausanne
Fruh, Cornelius, Bukarest
Kriesis Dr. Joh. A.
Burgschaft w/Investira S.A.
Schadloserklarung Greutert/Athanil
~~Burgschaft w/Englert & Becker~~
Kredit Romanil S.A.
R.P.-Konsortium
Cessionsvertrag/Masernserum
Dr. Degkwitz
Osmon A.G.
Teerfarben A.G.
Timanil S.A.
Coloranil S.A.
Burgschaft w/Indanthrenhaus Wien
Current Correspondence 1930/42
Burgschaft w/Ernst v. Muralt
44 Indanthrenhaus Wien
Masernschutzserum
Current Correspondence 1932/41
Depeschenschlussel
Current Correspondence 1924/25

That, according to the lists sent me, the 21,624 documents now en route, excluding the foregoing "Farben" documents, respectively are addressed to or received from, or pertain or relate to, or mention or involve 52 of the accounts, persons, firms, corporations and other entities, or their respective affairs and transactions, listed in my affidavit of June 20, 1956, plus two names not heretofore listed by us, namely, Metallbank and Synthetic Nitrogen Products Corporation.

That in view of statements made in appellees' opposition and supporting affidavit, I caused to be delivered by hand on June 27, 1956, to counsel for appellees a letter, copy of which is annexed hereto, marked Exhibit A; and I received in the mail on Friday, June 29, 1956, a reply dated June

(1945)

28, 1956, copy of which is also annexed hereto, marked Exhibit B.

JOHN J. WILSON

Subscribed and sworn to before me this 2nd day of July, 1956.

/s/ VERA McG. SIMPSON
Notary Public, D. C.

[SEAL]

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45 Filed July 14, 1956

Exhibit A

June 27, 1956

Mr. Sidney B. Jacoby
Office of Alien Property
101 Indiana Avenue, N. W.
Washington, D. C.

Re: *Societe Internationale v. Brownell, District Court No. 436048 and Court of Appeals No. 12140*

Dear Mr. Jacoby:

In your opposing memorandum (p. 5) and supporting affidavit (p. 7), received this morning, in relation to our motion for an extension of time, you refer to the fact that you are aware of "well over 50 additional names, largely of German and Farben-connected companies and individuals, which had business transactions with Sturzenegger", not included by you in the "124 names", and not appearing on the list in my affidavit. You do not mention these additional names.

If you will furnish me with this additional list, and if it appears that the names come within the scope of Judge Laws' order, I shall promptly submit the list to Swiss counsel with a recommendation that if the Sturzenegger Bank has any records relating to the names thereon, steps should be taken immediately to solicit from them waivers

(1949)

and consents looking toward the release of such documents for inspection by you.

Very truly yours,

JOHN J. WILSON

JJW:mlm

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46 Filed July 14, 1956

Exhibit B

JDN:SBJ:is
9-21-1335

June 28, 1956

John J. Wilson, Esq.
Whiteford, Hart, Carmody & Wilson
815 Fifteenth Street, N. W.
Washington 5, D. C.

Re: *I. G. Chemie* v. *Brownell*

Dear Mr. Wilson:

This is to acknowledge receipt of your letter of June 27, 1956, addressed to Mr. Jacoby of my staff, in which you refer to a certain statement made in our opposing memorandum and in Mr. Jacoby's affidavit concerning over 50 additional companies and individuals which had business transactions with Sturzenegger, in addition to the so-called list of the 124 names. You request that we furnish you with a list of the additional names.

It is, of course, your client's duty to comply with the Court's order of production in full. Even if the waiver procedure were acceptable, it would be incumbent upon your client to solicit all necessary waivers, not merely waivers from the customers defendants happen to know about. I would not wish to make any suggestions in this respect which might lead plaintiff to believe that defendants are interested in only a portion of the papers which the Court has ordered produced or that defendants would be satisfied with less than full production.

(1950)

Do I take your offer to solicit waivers from additional customers listed by us as an admission that your client has not heretofore solicited waivers from all persons whose waivers would be required for a full compliance with the District Court's order?

Very truly yours,

/s/ James D. Hill
JAMES D. HILL
Chief, Litigation Section

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47 Filed July 14, 1956

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12140

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., etc., *Appellant*,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., *Appellees*.

Supplemental Memorandum in Relation to Appellant's Motion for Extension of Time.

1. With respect to the 110 books of account of the Greutert/Sturzenegger private bank, it will be possible for appellees' representatives to examine those books in Switzerland to the extent that disclosure of the subject matters has been consented to by the owners of the banking secrets therein contained, upon appellees obtaining the authorization from the Federal Council of Switzerland

(1951)

under Article 271* of the Criminal Code for permission to exercise their official functions in this respect upon Swiss soil. Appellant believes that the Federal Council will grant its authorization under Article 271; and appellant is willing and ready to cooperate with appellees in the procuring of such authorization.

2. Under date of May 9, 1956, appellant's Swiss counsel, Edmund Wehrli, had petitioned the Swiss Federal
48 Council for permission to have Special Master William J. Hughes, Jr., inspect under certain conditions the Sturzenegger Bank records in Switzerland. It had been the intention of appellant, if such application had been granted, to ask the District Court and appellees to accept the Special Master's examination in lieu of the discovery order of July 5, 1949. Under date of July 5, 1956, President Feldmann of the Confederation of Switzerland, who is also a member of the Federal Council and the Chief of the Federal Justice and Police Department, wrote Dr. Wehrli that a granting of his application would be contrary to Swiss law, and contrary to the previous attitude of the Federal Council. Copies of President Feldmann's letter, both in the original German text and an English translation thereof, are annexed hereto.

3. However, President Feldmann has indicated, as will be seen from his letter, that the Government of Switzerland under the circumstances mentioned, would permit a neutral person—one who has no connection with the parties to the suit and has no personal interests in Interhandel—selected by the parties with the approval of the American Court and the Swiss Federal Council, to examine those documents of the Bank which have not so far been or may not be pro-

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* Article 271 provides as follows:

"*Forbidden activities for a foreign state:* Whoever on Swiss territory, *without authorization* takes on behalf of a foreign state any action which is within the province of a government agency or government official, * * * shall be punished by imprisonment. In serious cases the penalty is penitentiary." (Emphasis supplied)

(1952)

duced, as well as those portions of the books of account which may not be exhibited as indicated in the first paragraph hereof, for the purpose of determining whether or which of the remaining papers and items are relevant. If this Court grants an extension, appellant will promptly move in the District Court for an adoption of this plan, including the selection of a neutral person to act in the manner outlined.

4. On the basis of the report, identifying such papers and items, which might be made by a neutral person pursuant to the preceding paragraph, appellant will be ready and willing, as suggested by President Feldmann in his letter, to apply to the District Court for letters rogatory in an endeavor to accomplish the production and exhibition of such remaining relevant papers and items before the Swiss court for the Canton of Basel City, which is the appropriate judicial authority to which letters rogatory would be addressed.

49 5. As indicated in previous moving papers of appellant in this connection, it has on hand in the United States at this time about 175,000 documents of the Bank and additional documents are expected to be received. Pending the carrying out of the foregoing proposed procedures, and during whatever extension this Court may see fit to grant, appellant will make available to appellees' representatives in this Country the documents which are already here.

Respectfully submitted,

(Signatures of Attorneys for Plaintiff-Appellant)

(1953)

Filed July 14, 1956

Berne, 5th July, 1956

CHIEF OF THE
FEDERAL JUSTICE AND
POLICE DEPARTMENT

Dr. E. Wehrli-Bleüler
Lawyer
Zurich
Bahnhofstr. 14

Dear Sir:

During our yesterday's conversation I had the opportunity to state to you and to Dr. Charles Gossweiler the point of view of the Federal Justice and Police Department in respect of your petition of May 9th, 1956 regarding the Interhandel case. Accordingly, the Federal Council cannot grant the request made by you to the Federal Council, which had the aim to allow the taking of official actions by an American judge on Swiss territory for the examination of the documents of the private bank H. Sturzenegger & Cie. at Basel. To give such a permission by the Federal Council would be contrary to Swiss Legislation and furthermore it would be contrary to the attitude taken by the Federal Council in the past years in the Interhandel case against the American authorities and Interhandel.

However, in the frame of the Swiss legislation, the Federal Justice and Police Department, as well as the Federal Council are willing to support Interhandel in its fight for its right with the American authorities, and particularly in its efforts to obtain a further extension of time of the fixed respite granted by the American Court until 23rd July, 1956 for the production of the Sturzenegger documents.

51 I see a possibility to achieve this aim, as I explained yesterday, by an immediate movement of Interhandel at the American Court with the object to have a neutral expert, who has no connections with the parties

(1954)

to the suit and has no personal interests in Interhandel, examine the Sturzenegger documents. The expert, about whom the American Court, the parties to the suit and the Swiss Federal Council would have to come to an agreement, would have to receive the instruction, limited to the proposals submitted by you to the Federal Council mentioned under figure 1,* to examine the relevancy of the Sturzenegger documents for the suit in America. This expert would have to be bound by obligation, in a manner to be agreed upon and which is in accordance with the Swiss rule of law, to keep secret the details coming to his notice when examining the documents. The manner in which this would have to be especially arranged must be agreed by the Federal Attorney at the given time.

Furthermore, as heretofore, an application to Switzerland by the American court in ordinary and proper form for legal assistance would be examined with good will. It may be possible that also a move by Interhandel in this respect would be beneficial.

I do not think to be wrong if I believe from our discussion of yesterday, that also you promise yourself some success with the aforementioned proceeding. In order to let you act freely, and in order not to lose any more precious time, I propose you that your application of
52 May 9th, 1956 will for the time being not be decided on the merits by the Federal Council. Depending on the success which your new steps before the American Court may have, it might be possible for you to withdraw your application. I believe that under the actual circumstances this proceeding represents an optimum which can be done for Interhandel at the present time.

Please accept, dear Doctor, the assurance of high esteem.

/s/ FELDMANN

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* This refers to figure 1 in Dr. Wehrli's application seeking permission for Special Master Hughes to examine the Sturzenegger records to determine "1. Whether and eventually which of these documents and books are relevant for the said suit."

55 Filed July 17, 1956

Defendants' Memorandum in Opposition to Plaintiff's Motion for Reconsideration of the Order of July 11, 1956, Denying Plaintiff's Motion for an Extension of Time.

Defendants, by their undersigned attorneys, oppose plaintiff's motion filed July 14, 1956, for reconsideration of the order of the District Court, dated July 11, 1956, denying plaintiff's motion for an extension of time.

The grounds for our opposition to an extension were previously stated in our memorandum in opposition filed in the Court of Appeals on June 26, 1956. For the convenience of this Court we submit herewith (Exhibit A) a copy of that memorandum, together with the annexed affidavit, both of which were attached to our memorandum of the same date filed in this Court opposing plaintiff's identical motion for an extension.

It is submitted that no sufficient grounds for a reconsideration of the order of July 11 have been stated in plaintiff's present motion. We respectfully refer the
56 Court generally to our attached memorandum of June 26 and merely wish to quote the concluding paragraph of that memorandum, as follows:

> "No valid reasons for an extension of the six months' period of grace have been asserted by appellant. Only continuation of partial and selective discovery pursuant to individual clearances by the Swiss Federal Attorney will occur if an extension were granted. Appellant makes no assertion that the full production of documents ordered by the District Court will be accomplished, nor does appellant make any representation whatever that the books of account will be produced."

Our present memorandum will be confined to replying to the several papers filed by plaintiff since that time and will briefly discuss the effect of the order of the United States Court of Appeals of July 12, 1956.

We submit that in its present motion plaintiff misinterprets the order of the Court of Appeals. In particular,

plaintiff is obviously wrong in its statements in paragraphs (4) and (5) on page 2 of the motion. The Court of Appeals did not, as plaintiff seems to contend (par. 5), disclaim that it had ruled adversely on the substance of the motion. And, clearly, the Court did *not* rule that plaintiff's motion *prima facie* has merit and is not frivolous (par. 4). Rather, we believe, the Court of Appeals did pass upon the merits of plaintiff's motion for an extension and denied it. In our opposing memorandum of June 26, 1956, we urged that plaintiff's motion for leave to file its motion for extension be denied, for the reason that the grounds stated were wholly insufficient on their face. There cannot be any doubt that the Court of Appeals had jurisdiction to consider the motion for an extension and to recall or modify its
57 mandate. Accordingly, the action of the Court of Appeals must be interpreted as a holding that the Court of Appeals saw no merit in plaintiff's motion for an extension. It simply declared that it had no objection to this Court entertaining a similar motion at this time, if it so desired.

We submit that no appropriate grounds have been stated by plaintiff in any of its papers justifying any extension. Plaintiff's motion of June 20 and its reply memorandum of July 3, 1956, were before the Court of Appeals when it rendered its decision of July 12, 1956. In any event, neither those memoranda nor plaintiff's supplemental memorandum of July 12 and the present motion furnish any grounds for an extension. Rather, the papers since submitted bear out the views in our memorandum of June 26 that the full production ordered by this Court will never be accomplished. Our memorandum of June 26, 1956, specifically pointed to the fact that plaintiff was significantly silent with respect to the production of the books of account of Sturzenegger. Plaintiff's supplemental memorandum of July 12, 1956, shows that, contrary to the order of this Court of July 5, 1949, there will never be any production of the 110 Sturzenegger books of account and their inspection by defend-

(1957)

ants, as envisaged by Rule 34 F.R.C.P. Rather, a method is proposed by which a neutral person pledged to secrecy would screen the books. That neutral person would have to be approved not only by the Court and the parties to the suit but also by the Swiss Federal Council (the Swiss Cabinet). He would be pledged to secrecy in accordance with Swiss concepts, in a manner to be agreed on with
58 the Swiss Federal Attorney. This third person, not defendants, would examine the 110 books of account[1] of Sturzenegger, and he would be specifically required to keep secret the facts coming to his attention through such examination. It would be up to him to determine which parts of the books of account are relevant for the present suit. And then there would be an attempt to secure by letters rogatory the production of those parts of the books which he has found to be relevant.

This is a short summary of plaintiff's "solution" regarding the Sturzenegger books, for which it now seeks an extension of time. Obviously, that method bears no resemblance to our Court procedures for a party's right to inspection under Rule 34 and is unacceptable. In its opinion of June 23, 1949, accompanying the production order here in issue, the District Court held that full discovery of the Sturzenegger documents and books of account should be made. Referring to defendants' claim that plaintiff was enemy owned, controlled and tainted and that it had sought to conceal the true facts of its ownership and control by the use of subsidiaries and affiliates, the District Court held: "In such a case every record of plaintiff, as well as of its subsidiaries and affiliates, may have a

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[1] And also those Sturzenegger documents for which no waivers have been obtained. Defendants would be permitted to look only at those excerpts of the books for which waivers have been obtained (to the extent, presumably, to which in addition clearances have been given by the Swiss Federal Attorney). And even that inspection by defendants of excerpts would depend upon defendants obtaining an authorization from the Swiss Federal Council under a provision of the Swiss Criminal Code. (Par. 1 of plaintiff's supplemental memorandum.)

(1958)

1958

tendency to prove or disprove such claims of defendants." In accordance with the full inpection of the Sturzenegger papers and books of account made by the Swiss Compensation Office in 1945 and 1946, the District Court's order
59 of July 5, 1949, thereupon ordered plaintiff to produce, *inter alia*, the 110 account books of Sturzenegger and permit their inspection by appellees. And when it appeared to the District Court in November 1953 that the full production, such as was required by the Government of Switzerland, would not be accomplished, the District Court dismissed the suit, stating in its opinion of November 16, 1953: "Any less production or access will not comply with the requirement of Rule 34." [2]

60 The Court of Appeals, in its opinion of June 30, 1955, specifically affirmed that the Sturzenegger

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[2] See also several statements of Chief Judge Laws during the hearing of October 20, 1953; for example:

"When the Government of Switzerland went to look into the ownership of this company, it had free access to the Sturzenegger records, as I understood it; and I am wondering if we are really objective when we might establish a rule sooner or later that where a plaintiff is told to produce papers that another Government thought were material, and had a perfect right to look at it, that he should take literally months and years of examination by this other Government, and by himself, and by arrangement and sorting, to produce them. I mean, that isn't my idea of discovery. My idea of discovery is when you call upon people to produce records, they produce them; and the other side looks at them promptly. You don't let somebody screen them.

"You might have a paper in there that is directly contrary to another paper that is produced. Somebody claims a privilege, and that stays out. Now, that is not my idea of disclosure." (Transcript, p. 22).

* * * * *

"You don't pick out something which you say, or which someone consents to, and say, 'You look at this.' You might keep back the most material thing in the whole outfit. I don't mean your client. I mean the Bank. That would be the result. It might be the most important paper in the outfit. If we put discovery that way, it isn't discovery. It is taking a peak at part of what the man has. It is taking a peek at his exterior, not everything he has." (Transcript, p. 28).

documents and books of account to be produced are relevant, and found that the full production ordered by the District Court was justified. 96 U.S. App. D.C. 232, 236, 237; 225 F. 2d 532, 536, 537.

In the face of the finding of this Court that full production is relevant and required, plaintiff's plan now proposes that a third party,[3] bound by an obligation of secrecy, determine what parts of the Sturzenegger books he considers relevant, and then those selections might be shown. This would clearly be a reversal of the holding of this Court, approved by the Court of Appeals. It would not be a method of production and inspection in accordance with the Federal Rules of Civil Procedure but rather would be an abdication of the functions of our Courts to an outsider bound by secrecy concepts of Swiss Law.

The following conclusions emerge from the various motions, memoranda, and affidavits submitted by plaintiff:

(1) The order of the Swiss Federal Attorney seizing the Sturzenegger documents and books of account still stands.

(2) The production for which plaintiff now seeks an extension is a partial and selective production dependent upon the willingness of individuals to give waivers and upon the unbridled discretion of the Swiss Federal Attorney to give releases.

61 (3) Clearly, appellant has never sought so-called "primary" waivers from all customers of the Sturzenegger bank, and some of the persons solicited have refused to give waivers.

The several affidavits submitted by John J. Wilson, Esq. give lists of persons to whom the cleared documents "respectively are addressed to or received from, or pertain or relate to, or mention or involve." It is not even asserted by plaintiff that *all* documents

[3] It should be noted that under plaintiff's plan not even the Special Master would be permitted to examine the books, as had apparently been requested by plaintiff in its petition of May 9, 1956 (see par. 2 of plaintiff's supplemental memorandum). No copy of the petition was attached to plaintiff's supplemental memorandum.

(1960)

in the files of the Sturzenegger bank relating to the persons on the lists in the affidavits, have been cleared.

(4) Admittedly, waivers have not been, nor will be, obtained from all required persons and, admittedly, the full production ordered by this Court will not be accomplished even if an extension is granted. Rather, the extension is sought for having a neutral person, pledged to secrecy, screen the books of account and the papers for which no waivers have been obtained and select what he considers relevant; then there would be an attempt to secure by letters rogatory an inspection of those parts of the books and the papers which he has found to be relevant.

It is respectfully submitted that plaintiff's motion for reconsideration of the order of July 11, denying its motion for an extension of time, be denied.

July 17, 1956

(Signatures of Counsel for Defendants)

(1961)

EXHIBIT A

62 Filed July 17, 1956

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,140

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., etc., (I. G. Chemie), *Appellant*,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., *Appellees*.

Appellees' Memorandum in Opposition to Appellant's Motion for Leave to File Motion for Extension of the Time Allowed in Modification of Affirmance of Dismissal Order.

Appellees, by their undersigned attorneys, oppose appellant's motion for leave to file a motion to extend the six months' period of grace granted by this Court to appellant for making the discovery required in the case. The judgment of this Court, dated June 30, 1955, affirmed the order of the District Court dismissing the complaint in this cause but provided

> "that if within six months after the receipt by the District Court of the mandate of this Court in this case discovery shall be made as required by the District Court, then the order dismissing the complaint shall be vacated by the District Court."

We submit that the motion for leave to file be denied, for the reason that the ground stated in the motion for extension of time is wholly insufficient on its face.

63 No valid reasons for an extension are asserted in the motion. Despite the extremely long delay in this cause, amounting to almost seven years since the District Court required the discovery in issue (order of July

(1962)

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5, 1949, R. 2023-6) and to almost one year since this Court granted the six months' period of grace, appellant does not even now assert that there will be a full compliance with the District Court's order of production if an extension were granted.

The complaint in this action was dismissed by the District Court on December 21, 1953 for appellant's failure to comply with the District Court's order of July 1949 requiring production of the Sturzenegger documents and books of account. R. 3275-6; opinions of the District Court, February 19, 1953 (R. 3127-52) and November 16, 1953 (R. 3262). These papers and books had been seized by the Swiss Federal Attorney in June 1950 to prevent violation of the Swiss laws of bank secrecy and economic espionage. In its opinion of February 19, 1953, the District Court held that the complaint would be dismissed if appellant did not comply with the order. Thereafter, in order to avoid dismissal, appellant made use of a procedure of individual releases of documents by the Swiss Federal Attorney which the latter had offered in June 1951. Then the Federal Attorney had offered to release individual documents, proved to be indispensable for the suit, if express waivers were produced for each document from all parties involved. The Swiss Federal Attorney, however, expressly reserved the right to refuse to release individual documents without stating reasons therefor. R. 2824-5. In October 1953, appellant offered for inspection some 63,000 documents which
64 had been released after waivers had been obtained by appellant; no books of account were tendered. R. 3251-3, 3257-9. The District Court, by opinion of November 16, 1953, held that the complaint should be dismissed, on the ground that there was no reasonable likelihood that appellant could make full production. R. 3262. By its opinion of June 30, 1955, this Court affirmed the dismissal, describing in detail the partial production which had been offered by appellant using the procedure of individual waivers and clearances. 96 U.S. App. D.C. 232, at 234-5, 225 F. 2d 532, at 534-5.

(1963)

Clearly, appellant is still proceeding pursuant to the procedure of individual waivers and individual clearances of documents by the Swiss Federal Attorney; see the second footnote on page 3 of appellant's motion for extension. Clearly, the Swiss Federal Attorney's order of seizure has not been revoked. The same kind of partial and selective production, previously rejected by this Court as insufficient, is continuing and it is for the purpose of further continuing with the same kind of procedure that an extension is now sought. There is no statement, in either the motion for extension or the accompanying affidavit, that all the required documents would be produced, even if an extension were granted. After stating the number of papers which appellant by now has cleared for production by the procedure of waivers and clearances, the motion merely continues:

> "Counsel are advised that efforts are being continued to procure additional records, and that it is expected that many more will be obtained." (p. 3)

In 1953, during its unsuccessful offer of a partial production, appellant made no tender of books of account but mentioned a plan for photostating mere portions of the books. 96 U.S. App. D.C. 232, 235, 225 F. 2d 532, 535. This
65 time, in its motion for an extension of the six months' period of grace, the books of account are not even mentioned. At this late stage, there is not even a suggestion that the books of account would be produced if an extension were granted.

Rather than furnishing any assurance that full compliance with the order will be forthcoming within a definite period of time, the motion seeks an unspecified extension, stating simply that many documents[1] are ready for pro-

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[1] The mere number of documents claimed to have been cleared through individual releases and to be now ready for production (154,275) is unilluminating and entirely uninformative. The figure cannot be brought into any relationship to the number of documents, required to be produced, which were examined by the Swiss Compensation Office and are

(1964)

duction and "that many more will be obtained." The motion refers to a list of persons and corporations "in which counsel for the defendants-appellees expressed an interest in the course of the 'good faith' proceedings before the Special Master." The motion asserts that the persons and corporations to which the papers now ready, and those to be obtained, relate are "amongst those" in that list. Appellant's motion then continues:

> "Obviously, the interest [of appellees] was in having plaintiff produce records of the Bank pertaining to them. Thus, the production of these documents is in compliance with the discovery order." (p. 3)

66 This is a plain *non sequitur*. As explained in Part II of the attached affidavit, the list of 124 individuals and corporations became part of the record in 1951 and was prepared overnight by defendants' counsel upon request of the Special Master as a list of persons from whom counsel had reason to believe waivers could have been obtained without difficulty. The list was prepared for the purpose of vividly demonstrating appellant's bad faith at the time of the seizure order in 1950. It is not, and never was intended to be, a comprehensive list of Sturzenegger's customers. The list of 124 names has no relation to the discovery order and covers only a portion of the documents which must be produced under that order. As shown by the attached affidavit, a more careful examination of the record in this case and of the documents inspected by appellant has revealed well over 50 additional names, largely of German and Farben-connected companies and individuals, which had business transactions with Stur-

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described in its report as "dossiers about . . . 450 . . . containing files about 55,500." R. 1761. Mr. Sturzenegger himself explained that one "file" in a dossier may consist of a collection of documents. R. 6630-1. What is important is that despite their high number the documents now offered do not amount to a full compliance with the District Court's order of production and that there is not even a claim that, together with the documents to be obtained, there will be full compliance. See the discussion *infra*, pp. 5-6 in the text of this memorandum.

(1965)

zenegger. These names do not appear in the list of names in the affidavit accompanying appellant's motion. Clearly, as was demonstrated at the time of the partial production offered in 1953 (R. 3199-200, 3241-2, 3257-61) and is now shown again by the statements in appellant's recent motion and by the facts disclosed in the attached affidavit, appellant has limited itself to soliciting waivers concerning transactions pertaining to the above-mentioned 124 individuals and corporations.

The production for which an extension of time is now sought hence is partial and selective for several separate, important reasons. First, it is a production dependent upon the willingness of individuals to waive and upon the unbridled discretion of a foreign official to give releases. Secondly, at the time of the offer of a partial production in 1953, it developed that a substantial number of the 124 persons solicited for waivers had not given their consent. "A few persons had refused to waive, a few others were dead or did not respond, or were liquidated corporations whose successors could not be located." 96 U.S. App. D.C. 232, at 235, 225 F. 2d 532, at 535. Twenty others could either not be contacted or their waivers could not be obtained for other reasons. R. 3261. There is no representation whatever now that waivers were obtained in all these instances. Thirdly, waivers apparently are not even now solicited from all customers of the bank. Rather, efforts to obtain production are still limited to transactions pertaining to the 124 persons and individuals in the 1951 list.

67

There is a further, compelling, reason for denying the motion for an extension of the six months' period of grace. This case has been pending since October 1948 and the order of production, which has resulted in the dismissal, dates from July 5, 1949, almost seven years ago. As this Court has stated: "Years have been consumed in preliminaries and in efforts to obtain full discovery as ordered". 96 U.S. App. D.C. at 242, 225 F. 2d at 542. Under Section 9(a)

(1955)

of the Trading with the Enemy Act the property sued for must be retained in the hands of the Government during the pendency of the suit. The property in this case, alleged by appellant to be worth $100,000,000, consists of the stock in a large industrial corporation. It cannot be sold out of Government ownership, and the proceeds used as the law requires, so long as the suit pends. The schedule of events in this case, listed in the attached affidavit, shows some of the excessive delays of the litigation and illustrates how appellant has succeeded for years in postponing compliance with the production order.

68 Though the seizure order of the Swiss Federal Attorney was issued on June 15, 1950, appellant waited until April 2, 1951 to seek its revocation. On June 25, 1951, the Swiss Federal Attorney offered to release documents pursuant to individual waivers and clearances, but appellant began soliciting waivers only on May 30, 1953, after the District Court on February 19, 1953 held that the action would be dismissed if the order of production were not complied with. According to its own statements (p. 2 of the present motion for extension), appellant ceased its efforts to utilize the procedure of waivers as soon as the suit was dismissed by the District Court. And, admittedly, appellant did not resume its efforts until "after the exhaustion of its appellate recourse" (motion, p. 2), i.e., apparently not before the end of January 1956 when the mandate of this Court was filed in the District Court.[2] Accordingly, although the production order of the District Court has been in effect for almost seven years and although the Swiss Federal Attorney permitted the procedure of individual waivers and clearances five years ago, appellant during all this time utilized that procedure for not more than a total of approximately one year.

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[2] See p. 1 of the affidavit accompanying the motion. Apparently, appellant ceased its efforts immediately after the hearing before the District Court on October 20, 1953 (R. 1447-96). In any event, the efforts had ceased at the time of the entry of the order, December 21, 1953.

(1957)

No valid reasons for an extension of the six months' period of grace have been asserted by appellant. Only continuation of partial and selective discovery pursuant to individual clearances by the Swiss Federal Attorney will occur if an extension were granted. Appellant makes no assertion that the full production of documents ordered by the District Court will be accomplished, nor does appellant make any representation whatever that the books of account will be produced.

69

We respectfully submit that no extension be granted and that the motion for leave to file be denied.

(Signatures of Attorneys for Appellees)

(1968)

70 Filed July 17, 1956

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,140

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., etc. (I.G. Chemie), *Appellant*,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., *Appellees*.

Affidavit

WASHINGTON,
District of Columbia, ss.

SIDNEY B. JACOBY, being duly sworn, deposes and says:

I am an attorney in the Office of Alien Property, Department of Justice, Washington, D. C., and have been one of counsel for appellees in this case ever since institution of the action. This affidavit is submitted in opposition to appellant's motion for an extension of the time allowed for appellant's production in modification of the dismissal order.

I

The order of the District Court which led to the dismissal of appellant's suit is dated July 5, 1949. By that order, appellant was required to produce, *inter alia*,
71 the documents and books of account of the private bank H. Sturzenegger & Cie., Basle, Switzerland, found by the Court to be closely affiliated with, and under the control of, appellant. The production order has been in effect, unchanged, for almost seven years. The chronology of the events which have occurred during that period, relating to the production of the Sturzenegger papers, is as follows:

(1969)

July 5, 1949—The District Court ordered full reciprocal production of documents. After inspection of the Government's documents, appellant was required to produce, in Switzerland, for inspection and copying, its own records and those of the Sturzenegger bank. R. 2023-6.

June 15, 1950—Shortly before the time set for appellant's production, the Swiss Federal Attorney issued an order forbidding Sturzenegger to produce its records. The stated purpose of the order was to prevent violation of Swiss laws relating to bank secrecy and economic espionage. R. 4925.

October 31, 1950—Defendants-appellees moved to dismiss the action because of appellant's failure to produce the Sturzenegger records. R. 2269.

April 2, 1951—After the Court had, on March 1, 1951, referred to the Special Master the question of appellant's good faith in seeking to comply with the discovery order (R. 2416), appellant requested the Swiss Federal Attorney to countermand his seizure order of June 15, 1950. R. 2823.

72 May 23, 1951—Defendants-appellees read into the record, in the good faith proceedings before the Special Master, a list of 124 companies and individuals from whom there was reason to believe waivers could have been obtained by appellant without difficulty. R. 4939-62.

June 25, 1951. The Swiss Federal Attorney denied appellant's request that he revoke the order of June 15, 1950. However, he offered to release individual documents proved indispensable for the suit, provided waivers were obtained from all persons involved, but reserved the right to refuse to release any papers without stating the grounds therefor. R. 2824-5.

July 9, 1952—The Special Master filed findings and conclusions holding that appellant had acted in good faith in its efforts to comply with the order of July 5, 1949. R. 2509-2651.

September 9, 1952—Defendants-appellees filed objections to the Special Master's report and renewed their motion to

(1970)

dismiss for appellant's failure to produce the Sturzenegger papers. R. 2838-42.

February 19, 1953—Opinion of the District Court ruling that the suit was subject to dismissal because of appellant's failure to produce, but granting three months' time in which to comply. R. 3127-52.

73 March 31, 1953—Order of the District Court extending until June 15, 1953, the time in which appellant must comply with the order of July 5, 1949. R. 3191-3.

March 31, 1953—Appellant applied to the Swiss Federal Attorney for the release of the Sturzenegger documents. Its application was denied on April 14, 1953. R. 3198, 3205-10.

April 29, 1953—Appellant appealed from the decision of the Federal Attorney to the Swiss Federal Justice and Police Department. The latter affirmed the decision of the Federal Attorney on May 28, 1953. R. 3199, 3215-24.

May 30, 1953—Appellant solicited waivers from the 124 companies and individuals on the list compiled by defendants-appellees, requesting their consent to the production of the Sturzenegger records relating to them. R. 3200, 3228-9.

June 4, 1953—Appellant appealed to the Swiss Federal Council from the decision of the Federal Department of Justice and Police, May 28, 1953. R. 3201, 3235-8.

June 19, 1953—Order of the District Court extending until July 15, 1953, the time in which appellant should produce. R. 3238.

74 June 30, 1953—The Swiss Federal Council dismissed appellant's appeal. R. 3248-50.

July 14, 1953—Appellant moved the District Court for an extension of time until September 15, 1953. R. 3240.

October 16, 1953—Appellant moved for another extension for an unspecified time in which to produce. R. 3251-3.

November 16, 1953—In a memorandum opinion, the District Court found that despite four years of elapsed time there was still no reasonable likelihood that appellant could make full production of the documents. R. 3262.

December 21, 1953—Order of the District Court dismissing appellant's complaint with prejudice. R. 3275-6.

(1971)

June 30, 1955—The Court of Appeals affirmed the order of dismissal but provided in its judgment that said order shall be vacated "if within six months after the receipt by the District Court of the mandate of this Court in this case discovery shall be made as required by the District Court."

September 1, 1955—Appellant's petition for rehearing *en banc* was denied.

75 January 9, 1956—The Supreme Court denied appellant's petition for a writ of certiorari. 350 U.S. 937.

January 18, 1956—The Court of Appeals denied appellant's motion for leave to file consolidated motion for a stay of mandate until a conflict was resolved between its opinion and judgment of June 30, 1955.

January 24, 1956—Mandate of the Court of Appeals received and filed in the District Court.

February 27, 1956—The Supreme Court denied appellant's petition for rehearing. 350 U.S. 976.

II

In the course of the proceedings to determine whether appellant acted in good faith in its efforts to comply with the production order of July 5, 1949, defendants-appellees contended that if appellant had been in good faith it would have complied with the order to the extent of producing the records of companies wholly owned by the appellant and by Sturzenegger. When the Special Master, on May 22, 1951, inquired whether defendants intended to put into the record the names of these companies, defendants undertook to present such a list the following morning. R. 4865. Accordingly, on May 23, 1951, counsel for defendants submitted the names of subsidiaries owned by appellant and by Sturzenegger. R. 4939, 4940-2. At the same time, defendants also read into the record the names of firms and individuals from whom appellant and Sturzenegger could have readily obtained waivers. In summarizing

76 the entire list of 124 names (R. 4939-61), counsel for defendants reminded the Special Master that the list was compiled overnight and that it was not to be

(472)

considered as binding upon the defendants because the list could be supplemented and improved. R. 4962. As counsel for defendants stated:

> "This is a hurried collection of firms and individuals as to which there is one or more or several reasons to believe that a waiver was given, could be given, so instante, should have been given, ought to have been given." (R. 4962).

The affidavit accompanying appellant's present motion lists 114 persons and entities, not counting two names listed twice. Documents pertaining to the 114 names are claimed now to be available for inspection, but of these names thirty-one are simply internal Sturzenegger bookkeeping accounts which were comprehended in our list of 124 by one single item.

A comparison of appellant's list with the 124 names shows that appellant has scarcely gone beyond the names on defendants' list in soliciting waivers and clearances. As I have stated, the list of 124 was hastily compiled overnight. A more careful examination of the record herein and of defendants' documents inspected by appellant has revealed the names of substantially more than half a hundred individuals and corporations, not included in defendants' list, which had accounts and substantial transactions with Sturzenegger. Many of those were German or Farben-connected. They do not appear on the list attached to appellant's present motion.

/s/ SIDNEY B. JACOBY

June 26, 1956

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77 Filed July 19, 1956

Defendants' Supplemental Memorandum in Opposition to Plaintiff's Motion for Reconsideration of the Order of July 11, 1956, Denying Plaintiff's Motion for an Extension of Time.

Defendants, by their undersigned attorneys, file this supplemental memorandum in order to bring to the Court's

(1973)

attention the attached order issued by the Court of Appeals on July 17, 1956, denying plaintiff's motion for leave to file its supplemental memorandum of July 12.

The supplemental memorandum of July 12, is the only paper attached to plaintiff's motion for reconsideration, dated July 13, which was not previously passed on by the Court of Appeals when it issued its order of July 12 denying plaintiff's motion of June 20. Thus, by this latest action the Court of Appeals has now ruled adversely on all the memoranda which plaintiff submits with its present motion for reconsideration. In particular, we desire to direct the Court's attention to the following clause in the order:

> ". . . and the Court having *considered* the matter in said supplemental memorandum and being nevertheless of the view that the action on July 12, 1956, on said motion was proper . . ." (Italics added)

78 We submit that this confirms the views expressed on pages 2-3 of our memorandum of July 17 that plaintiff has misinterpreted the earlier order of the Court of Appeals. The fact that the Court of Appeals now states that it has "considered" the supplemental memorandum bears out our view, contrary to plaintiff's interpretation, that by its action the Court of Appeals *did* pass upon the merits of plaintiff's motion for an extension.

Respectfully submitted,

(Signatures of Counsel for Defendants)

July 19, 1956

(1974)

79 Filed July 19, 1956

Copy

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,140

APRIL TERM, 1956

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A. etc., *Appellant*,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., *Appellees*.

Before: WILBUR K. MILLER, FAHY, and DANAHER, *Circuit Judges*.

Order

On consideration of appellant's motion filed July 12, 1956, for leave to file supplemental memorandum with respect to appellant's motion filed June 20, 1956, "for leave to file motion for extension of time allowed in modification of affirmance of dismissal order," and it appearing that said motion of June 20, 1956, was acted upon by this Court on July 12, 1956, and the Court having considered the matter in said supplemental memorandum and being nevertheless of the view that the action on July 12, 1956, on said motion was proper, it is,

ORDERED by the Court that appellant's motion filed July 12, 1956, for leave to file supplemental memorandum be, and it is hereby, denied.

Per Curiam

Dated: July 17, 1956

(1975)

Filed July 23, 1956

Plaintiff's Memorandum in Reply to Defendants' Opposition Filed July 17, 1956

In defendants' memorandum opposing plaintiff's motion for reconsideration of this Court's order of July 11, 1956, defendants misconceive (a) the order of the United States Court of Appeals, (b) the plan designed to accomplish full compliance, and (c) the scope of the discovery order of July 5, 1949.

Order of the United States Court of Appeals, Dated July 12, 1956.

It is absurd for defendants to state that "the Court of Appeals did pass upon the merits of plaintiff's motion for an extension and denied it." If so, then why did the Court of Appeals rule as it did? That Court knew that this Court had already denied the motion. Rather, it is plain that, in the light of the holding of the United States Court of Appeals, this Court has jurisdiction and power to grant an extension, and this Court should reconsider its previous action. If, in its memorandum opinion of June 28, 1956, this Court held that it had no jurisdiction, the Court of Appeals ruled to the contrary. If, on the other hand, in its decision of June 28, 1956, this Court ruled on the merits of plaintiff's motion, the Court of Appeals indicated that this Court should reconsider its action.

81 Everything points to the fact that the Court of Appeals did not make an adverse ruling on the merits of plaintiff's motion. It seems obvious that the appellate court has stated, in effect, that the first decision on the merits should be made by this Court.*

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* After this memorandum was prepared, plaintiff received a "Supplemental Memorandum" from defendants, referring to the action of the United States Court of Appeals on July 17, 1956. Defendants find support for their position because of the use of the word "considered" by the Court of Appeals in its order. The words "upon consideration" appear, as well, in the earlier order. There is no doubt in the mind of plaintiff that the Court of Appeals "con-

(1976)

The Plan Does Envisage Full Compliance

Defendants state (p. 3) that "there will never be any production of the 110 Sturzenegger books of account and their inspection by defendants, as envisaged by Rule 34 F.R.C.P."

Defendants are in no position to make that contention. The plan is a very simple one. The defendants seek to complicate it.

The plan contemplates an examination of the Sturzenegger books co-terminously with the documents which have been produced and are ready for inspection. Whatever is left over, if anything, which may be relevant or material, would be identified by the neutral person proposed by the Swiss Federal Council, and could then be the subject of letters rogatory. The pledge of secrecy on the part of the neutral person would, of course, not bar a disclosure to the extent of identification of any remaining relevant documents or relevant items in the books.

Even if the plan for a neutral person should be vetoed by the defendants, it may be possible to accomplish compliance with the order through letters rogatory, if and when an inspection of the 192,000 documents and the books shows what else is relevant, and, therefore, what can be identified for letters rogatory.

82 A word should be stated concerning the question of relevance of the documents. There is no doubt that both this Court and the Court of Appeals have held, in principle, that the Bank's documents are relevant, but in a vast production, such as the instant one, at this point the question is not one of relevance in principle, but relevance of each and every separate piece of paper and item in the books. For example, the payment of an electric light or water bill would undoubtedly be reflected in the Bank's records, but such items could hardly be relevant

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sidered", everything in all the motion papers, but this does not mean that it ruled on the merits. What that Court meant is to be measured by the sum total of what it did; and that is far more consistent with the interpretation placed upon its action by the plaintiff.

(1977)

to this lawsuit; and a letter of sympathy from the Bank to the family of a deceased customer could not possibly be enlightening either to the Court or to the parties in this case. Indeed, the entire transactions of one or more customers of the Bank may have no connection whatever with the issues herein. Similar situations were found to exist in relation to plaintiff's own papers, although there was a *general* claim and concession of relevance.

The Court must be alerted to the obvious fact that defendants are endeavoring to make the production here so complex in theory as to discourage the Court with respect to the possibility of compliance.

The Order of July 5, 1949 Does Not Require the Production of all The Sturzenegger Records

Plaintiff has established this proposition beyond any preadventure in its previously filed motion papers relating to the present application for an extension of time. Defendants distort the Court's order by blandly charging plaintiff with a "partial" production and with failure to obtain waivers from "all" customers of the Sturzenegger Bank. Defendants are not in a position at this point, not having taken the time and trouble to examine the available documents, to assert that the production is partial; nor can they aver with knowledge that waivers have not been sought from "all" customers of the Bank, or that the Bank has papers relating to customers whose waivers have not been solicited or obtained.

83 This Court ordered the production of about 55,500 documents or 55,500 groups of documents consisting of two or three papers each. The production of over 192,000 documents is in excess of that amount. On the basis of numbers alone, there has been a substantial compliance here. Where such quantities are involved, it is respectfully submitted that it would constitute arbitrary action not to require the defendants at least to look at that which has been made available. The thesis that one missing

document or a dozen missing documents might contain incriminating evidence is an easily phrased theory which may have no practical virtue in this instance. With the thousands upon thousands of bank records available, and with the Swiss Compensation Office Reports as a guide in defendants' search, plus the documentation which the defendants have retrieved from Germany and other German-occupied countries, it is not likely that this thesis will be proved out here. But, more importantly, the discovery order in this case presupposes that there shall be "missing" documents, that is to say, that there shall be less than 100% of the Bank's records, because the order fails to call for the production of *all* such records. The order contemplates that the production shall be "partial" in the sense of less than all; and it further contemplates that there may be files in the Bank which in no wise are embraced within its scope.

While it is a late time to underscore this fallacy, it is high time that everyone should be awakened to its existence. This Court has never ordered a production of *all* of the Bank's records. It matters not in this connection, plaintiff respectfully submits, what the Court may have stated from time to time in the course of argument of counsel or what may have been written in its opinions. All of this was merged and absorbed into a clear, unambiguous order whose language requires no interpretation. The order is the controlling document here. This must never be lost sight of. It may be a serious omission from the point of view of the defendants, but, nevertheless, the order stands as the controlling factor, and it gives the defendants less than they are claiming.

84

Conclusion

The production here has been so large and the efforts of the plaintiff so diligent that plaintiff deserves an additional, reasonable time to endeavor to implement the production up to the moment by procedures which may very well

(1979)

1979

bring about a compliance which would be considered "full" in every practical sense within the terms of the instant order.

(Signatures of Attorneys for Plaintiff-Appellant)

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85 Filed July 23, 1956

Order Denying Motion for Reconsideration

Upon consideration of plaintiff's motion filed July 14, 1956, for reconsideration of the Court's order of July 11, 1956, denying plaintiff's motion for an extension of the time allowed by the Court of Appeals in affirming the dismissal order of this Court, and upon consideration of defendants' memorandum in opposition thereto and of plaintiff's reply, and after hearing argument by counsel, it is, by the Court, this 23rd day of July, 1956,

ORDERED, that the motion of plaintiff be, and it hereby is denied.

The Court, expressly determining under Rule 54(b) Fed. R. Civ. P., that there is no just reason for delay, hereby expressly directs that final judgment be entered in respect of the Court's order of July 11, 1956, and in respect of this order.

/s/ BOLITHA J. LAWS
Chief Judge

Seen:

Attorney for Plaintiff

Filed Aug. 29, 1956

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4360-48

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., etc.,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, etc., et al.

Motion for Reconsideration

* * * * * * * * * * *

Washington, D. C.
Monday, July 23, 1956

The above-entitled matter came on for hearing before Chief Judge Bolitha J. Laws of the motion of plaintiff for reconsideration of order denying motion for extension of time.

Appearances:

On behalf of the plaintiff:

John J. Wilson, Esq., and
Duane G. Derrick, Esq.

On behalf of the defendants:

Sidney B. Jacoby, Esq.,
James D. Hill, Esq.,
Paul E. McGraw, Esq.,
Ernest S. Carsten, and
Maurice J. Levin, Esq.

(1981)

1951

The Deputy Clerk: The case of Societe Internationale, etc., v. Brownell, Civil Action 4360-48.

Mr. Wilson: May it please the Court, first may I thank Your Honor for suspending your vacation to give me this opportunity of an oral hearing. I know that I do not have to assure the Court, but I will say nevertheless that in my seeking this oral hearing I have not meant to trifle with the court. I am extremely serious in the positions which I intend to take today.

Indeed, I wish that there were some way that I had not been obliged to be here, because I do not think any lawyer in the practice of law ever had the responsibility that rests on me in this connection. I feel that in the situation that I am in I would not wish it upon my worst enemy, that he should be responsible as counsel for a plaintiff for the dismissal of an action of this size under these circumstances. Consequently, I am here today, never more seriously, never more sincerely, asking the Court to extend our time to comply with the Court's discovery order.

I sent Your Honor on Friday an additional memorandum, hoping that it would be received before you left your country place for the city. I am not certain whether you received it or not. It is a reply to the Government's
3 opposition.

The Court: I think I received it, yes. It is the one that is just handed up here now.

Mr. Wilson: Yes.

The Court: I have seen that.

Mr. Wilson: I mailed you one to Round Hill Friday.

The Court: I received it and read it, yes.

Mr. Wilson: Now, if I may review this record for a moment.

We are here in connection with the judgment of the Court of Appeals which modified the affirmance, and which allowed six months from the time of receipt of the mandate of the Court of Appeals. The mandate of the Court of

(1982)

Appeals was received by this Court on the 24th of January, and the six months expired today or tomorrow, I believe tomorrow, although I am not certain. Your Honor is familiar with the language of the modification, because Your Honor quoted it in your memorandum of June 28th.

On the 20th of June, having made a tremendous amount of progress in the production of documents, I filed motions in both courts for an extension of time, not being sure which court had jurisdiction to extend the time.

Your Honor will remember at the time you signed the order for dismissal with prejudice in December of
4 1953 that we had been able at that time to assemble and tender for inspection 63,000 documents. I stand before Your Honor this morning, and the record is clear upon the point that I have in my possession 192,000 documents ready for inspection. When the quantity was shaping up so largely and these documents were being received by me in this country, we went to work around the 1st of June in the preparation of an appropriate motion, and we submitted it to both courts. The Office of Alien Property opposed us in both courts. They opposed us in this court upon the ground that the court had no power or jurisdiction to grant an extension. They opposed us in the Court of Appeals on the merits of our right to an extension.

Amongst other things, in the Court of Appeals we were accused, as has been the custom over the years, of deliberately delaying this case. We were criticized for not having re-undertaken the production of documents until after the mandate of the Court of Appeals came down. Then the old story was told that we had delayed this case for seven years, and the papers which have come to Your Honor's attention by virtue of their being included in a motion for rehearing, pointed out what the events were over the years, and we were not responsible for any undue delay. This case took the normal course for a case of this magnitude
5 and importance and complexity.

With respect to the question of whether we should

(1983)

1983

have been active from the time Your Honor entered the order for dismissal in 1953, it was pretty clear that we felt that Your Honor was in error. Your Honor, at the time of signing the dismissal order, said that you would not allow us any further time. We then undertook to pursue our appellate recourse; after we got a second surprise in the Court of Appeals affirming Your Honor, we still felt that the Court of Appeals was in error. We felt that we had one or more of the grounds which had been suggested by the Supreme Court for certiorari, and we applied for certiorari, which was denied sometime around the first part of January. There was a motion for a revision of the judgment of the Court of Appeals because it was in conflict with the last paragraph of the decision.

All of this came out to about the 24th of January.

Now, there isn't a soul in the world who can charge us with having delayed the appellate recourse. We proceeded promptly, both sides proceeded promptly right straight through. So I think it cannot be said that we have delayed this, and cannot reasonably be said that we should have re-undertaken the search and the obtaining of more documents, until after the Supreme Court had finally acted in denying certiorari.

6 Now, if the Court please, let me speak for a moment about Your Honor's order. We are dealing with a quantity of papers defined in Your Honor's order and a quantity of books mentioned in Your Honor's order. May I say, and I will come to this in more detail, that our position is that we have a plan which envisages full compliance with Your Honor's order. We need more time to put it into effect. The plan is not one which could have been conceived earlier, because it was part of and integrated into the quantity of production which has been achieved, and the solution which has been accomplished to this extent with respect to the books of account.

I say to Your Honor in the memorandums and I say to Your Honor here with great seriousness, that there has

(1984)

been permitted to creep into this case the concept that all of the Sturzenegger documents are to be produced. That is not what Your Honor's order says. If by the use of the term "full production" it means full production within the terms of Your Honor's order, I can understand that term. But I want Your Honor to realize, and I am sure you do from things I have said, that you did not order production of all of the Sturzenegger books.

An examination of Your Honor's order of July 5, 1949, is interesting in contrast. When Your Honor ordered the production by the Alien Property Custodian of its books, the language of the order is that "all documents and papers now in your possession" are to be produced. When you came to the order with respect to the Chemie and Sturzenegger documents, you did not use that language.

It is true that in an earlier opinion, Your Honor had argued for a production which was fairly universal; but your order did not say that. Your order is not ambiguous. The opinion of Your Honor merged into and was absorbed into the order, the order needs no construction, and I say to the Court with great respect, Your Honor and the parties are bound by the order until Your Honor amends it.

Now, I have pointed out to Your Honor, without any question, there is no question about it, that when Your Honor ordered the Government to produce its documents, you referred to all. When you ordered us to produce our documents you said this:

"It is further ordered that the motion of defendants to order plaintiff to produce for inspection, copying and photographing all documents not privileged in its possession, custody or control, relevant to the issues in this case, be and it is hereby granted in the following respects and subject to the following conditions:"

and then you defined the quantity of jackets, the quantity of papers, and the quantity of books, and you got the figures which are in your order from the investigator's report of the Swiss Compensation Office.

(1985)

So your order in this case for the Sturzenegger records, in effect, says this: "You are to produce 110 Sturzenegger books. You are to produce 450 dossiers or jackets. You are to produce 55,500 documents or sets of documents." I will come to that in a moment.

Now, the best proof that Your Honor did not order 100 per cent production of the Sturzenegger documents is, or 100 per cent production of any documents on our side of the case, is what you did in the next paragraph, when you required the production of the Osmon corporation records, which is a wholly owned subsidiary of ours. In other words, you know the situation with Sturzenegger, you know the great dispute between the court and myself over the lack of control. There was no dispute about our capacity to produce the records of Osmon, a wholly owned subsidiary, and yet in the paragraph ordering the production of the Osmon books, with our having 100 per cent control over every one of them, you narrowly defined the quantity of production, by a paragraph which is definitive under an "A" and a "B."

So it is clearly beyond any question, as a matter of
9 law in this case, because Your Honor has put your decision into an order, which as I say to the Court with great respect is as binding upon the Court as it is upon the parties; and Your Honor has not ordered production of all the Sturzenegger documents.

Now, in 1953, when we were before Your Honor, struggling to make some kind of compliance here, Your Honor referred to the idea that one missing document or a dozen missing documents may be crucial, may be decisive. As we said in our last memorandum to Your Honor, your order contemplates missing documents. Your order contemplates partial production. Your order contemplates that all of the records of Sturzenegger will not be produced. By being definitive as to quantities and specifying what we are to produce, and by the very nature of things, if there is not the requirement for 100 per cent production,

then there are bound to be missing documents, there is bound to be partial discovery, there is bound to be less than all produced. And that I say to the Court by the sanction of the Court in the form of its order.

Now, if the Court please, we have struggled with this problem in Switzerland; we sought first to have permission granted to the special master to go to Switzerland and to make an examination of these records, and to separate the relevant from the irrelevant ones, let us take what may be left of these documents which are relevant and try to get them by letters rogatory. The Swiss Government would not permit the special master to produce because of the status. They came back with a suggestion which I shall discuss in a moment.

With regard to the books, we have worked out an arrangement that these 110 books may be examined, as I say in my memorandum, coterminously with the documents. That is to say, the waivers which were adequate enough here to produce 192,000 documents, in my possession, now in file cabinets in my office, are sufficient to permit inspection of great sections of these books; indeed, perhaps most all of the relevant material.

Now let me speak for a moment about relevancy.

In the hearings in this case, there was no contest made about relevancy, and Your Honor ruled to that effect and the Court of Appeals supported you. Your Honor was dealing with relevancy in principle, and the Court of Appeals was dealing with relevancy in principle. But now, when you come to a vast production—and I dare say, because this sort of thing did not go on when Your Honor was practicing law—that it is difficult for a court, it is difficult for any human being to conceive of the nature and complexity of the production of 200,000 documents.

Now, many of those documents which are in my office are plainly irrelevant. I have looked at them. They have no more to do with this case—they will con-

(1987)

tribute nothing to this case. But quantitatively, because we had waivers, we brought them over.

Now, in the final showdown of this case, before this case is relegated to the ages, the question of relevancy becomes important, and the question of relevancy becomes particularly important now with respect to the remaining documents. Because as I said in my memorandum, the water bills, the electric light bills, the letters of sympathy which are in the bank's files, and indeed records of customers that have nothing to do with this case, are irrelevant.

Now, Your Honor did not go beyond relevancy. Indeed, Your Honor may not go beyond relevancy, according to the rule, and in your order you did not go beyond relevancy. In your order with respect to the Government, you used the phrase "having relation to any of the issues in the case." With respect to the order as it applied to us, you referred to the Government's motion seeking production of documents "not privileged which are relevant to the issues." Your Honor was ever mindful of the necessity for the documents to be relevant.

So I say, and it comes to this question that the
12 Swiss Government has proposed to us the examination of the remainder of the documents, that relevancy will have some importance.

Now let me go back to the procedures.

After Your Honor received from the Government based upon our motion of June 20th, the position that Your Honor had no power to extend the time, Your Honor handed down a memorandum on the 28th of June, and I must say I am not certain what was the basis for Your Honor's ruling. I know plainly Your Honor did not give me an extension, or an enlargement as Your Honor called it.

The Court: I could not reduce it, could I?

Mr. Wilson: No, sir.

The Court: I certainly could not say three and a half months or four months.

(1958)

Mr. Wilson: Well, you understand, I am not being critical of what Your Honor said.

The Court: I understand.

Mr. Wilson: I am being analytical. I could not tell whether Your Honor was saying you had the power or you exercised the discretion not to extend the time.

The Court: It was an exercise of discretion; since they had done something that was entirely different from what I had done, except that they followed the course that I had followed some two years before, three years before,
13 I did not think I ought to meddle with it.

Mr. Wilson: Well, by the time Your Honor had acted, these gentlemen from the Department had filed their opposition in the Court of Appeals, and so I filed a reply to that. At that time, I set forth *in haec verba* in the Court of Appeals memorandum your memorandum, Your Honor's memorandum, and I informed the court that on the 28th of June, Your Honor had denied our extension. Your Honor had not then signed the order, which is unimportant except as a procedural matter. Your Honor signed the order on the 11th of July.

There was then filed in the Court of Appeals an additional memorandum, which seems not to have come to the attention of the court at the time they entered their order of July 12th. Anyway, down came their order of July 12th, which denied our motion without prejudice to filing a similar motion with Your Honor.

Now, since the Court of Appeals knew that Your Honor had denied our motion, I construed this decision of the Court of Appeals to mean that the matter should be again called to your attention. So we did that, by a motion for reconsideration. We pointed out to Your Honor that there could be no doubt now of Your Honor's power to extend this time; that the Court of Appeals would not have taken the action which it did if it had not contemplated that Your Honor had the power. It also had the effect
14 of saying at the same time that we had the right to

(1958)

file with you. Indeed, they used the word "right" in their order, a motion for an extension of time.

I think the Court of Appeals said, thirdly, that Your Honor should reconsider your decision of June 28th. I went on to say that I thought that in view of the fact that the Court of Appeals was suggesting that we re-apply to Your Honor, that the Court of Appeals would not say that our motion was frivolous or that it was without merit, and would not be saying as a matter of law that we were not entitled to an extension.

Now, the Department of Justice and I differ on what the Court of Appeals did. The Department says that the Court of Appeals denied our application for extension on the merits. I cannot believe that. If the Court of Appeals knew that Your Honor had ruled against me and if the Court of Appeals had ruled on the merits against us, then why in the name of Heaven would we be sent back to Your Honor for a reconsideration of Your Honor's decision of June 28th? The only sensible solution is that the Court of Appeals felt that Your Honor should pass upon this question first. It indicated near the end of its opinion, Your Honor will remember, that you are dealing with these problems daily and that Your Honor has first-hand relationship with them.

So I think it is only fair to say that what the Court of Appeals did was to abstain from passing upon it, except to see that it had so much merit that it was not frivolous and suggested to us that we file the same motion with Your Honor.

And so we are here today with that motion in the nature of one for reconsideration.

Now, if the Court please, the plan which is set out in the papers envisages full compliance. It contemplates, as I said, the immediate inspection of the books to the extent that the waivers had been obtained. It contemplates the selection of a neutral person agreeable to everybody, for the purpose of going through the remaining items which

may be subject to Your Honor's order, separating the relevant from the irrelevant, reporting, of course, on the identification of irrelevant matter, and we are invited by the President of Switzerland to apply for letters rogatory based upon such a result.

In that situation, we need more time. We have not waited until the end of the six months to come in with no accomplishments here, and said "Give us more time to speculate." When less than five months had expired, we had produced over 160,000 documents. When less than four months had expired, we had pending in Switzerland applications to have a special master make the examination.

And before five months had expired, we presented
16 to Your Honor and to the Court of Appeals a motion for extension of time.

Then came in these solutions, because the President of Switzerland did not reply to our application until the 5th day of July, and almost only as long as it takes to put it on the typewriter, we submitted it to the Court.

Now may I say to the Court this: I stand here with very few hours left in this case, if Your Honor does not extend the time, and if the Court of Appeals should sustain Your Honor's position. I call Your Honor's attention to this additional fact: The intervenors in this case, who as Your Honor knows have been carved out of this unpleasant affair, have filed motions with the special master for letters rogatory for the purpose of getting these very same documents from Switzerland.

Now, what will happen? If Your Honor does not grant an extension here, and if the Court of Appeals sustains Your Honor in refusing to grant the extension, then we have the result that the intervenors go forward, let's hope successfully, as we believe we will, with the plan which we have submitted, and there will be a production of the very things for which we have striven in this case.

And so I say to Your Honor that with that eventuality facing the case, that is an additional reason why an extension of time should be granted.

(197)

17 Now, if the Court please, at one time in this case, the Government argued that the word "file" as translated from the German in the Swiss Compensation Office report meant two or three papers marked, clipped together. That came about this way: Indeed, Mr. Schwartz, in the cross examination of Mr. Sturzenegger, said that their translator had come out with the German word meaning one piece of paper.

Now, I am addressing myself to the language of Your Honor's order that "55,500 files must be produced." And as I have just said to Your Honor, the Office of Alien Property had been expertly informed that the German word meant one piece of paper. They questioned Mr. Sturzenegger about it, and he said the word meant two or three pieces of paper put together.

At the time that we were before Your Honor in 1953, if that term meant two or three papers put together, and if we were only able to produce 63,000 papers, we had fallen short of simple arithmetic, multiplication. With 192,000 papers and more coming, if Your Honor please, we will permit the 55,500 to be multiplied by the whole of 3. We have reached a numerical result here which is in excess of what Your Honor ordered.

Now, the parties whose papers have been produced have been listed in a series of three or four affidavits. All of the important characters in this play, their names
18 are reproduced in those affidavits. These very important secretariat and consortia which we heard so much about when we were arguing against the dismissal before Your Honor in 1953 have been produced. Mr. Jacoby said the other day in his memorandum, "We have got fifty other names." He doesn't know whether we have got papers on any of those fifty other names. He doesn't know whether they are customers of our bank, of the Sturzenegger bank.

So I said to Mr. Jacoby by letter, "Give me those fifty names and we will go right to work on them." We want

(192)

to produce every document here which is regarded as coming within the scope of Your Honor's order. We have far surpassed it numerically. The only place where we are slowed up right now is on the books, and we are going to have a solution of those books with respect to the remaining items, if Your Honor will only allow us time to do so.

Now, in the Court of Appeals recently—and this shows how hard put the Government of the United States is to hold onto this default judgment which they have gotten under the circumstances of this case. When we had produced on our first, the time of our first motion in the Court of Appeals on June 20, 155,000 documents and more were coming, the Office of Alien Property didn't refer to the two or three papers which Mr. Sturzenegger had mentioned as a definition of "file." They used the
19 phrase "collection of documents." They knew that a nebulous, undefined phrase "collection of documents" could not be multiplied by me to the point where we made a numerical production here which was far, far in excess of Your Honor's requirements.

Now, if the Court please, I say to you that no litigant, no man, no lawyer ever demonstrated the efforts which have been demonstrated in this case. This quantity of documents is almost beyond human comprehension. We have been diligent, we have not delayed, we have worked assiduously, we have done everything under the sun possible to advance a full production here. We expect to make full compliance, if Your Honor will allow us the additional time in which to do so.

Now, it will be said that we have delayed the sale of the stock in this case, that this lawsuit should be gotten over with, so that our stock may be disposed of by default by the Office of Alien Property, and the Department of Justice had the temerity to inform the Court of Appeals to please hurry up and get this thing over with, because we are unduly delaying the sale of our own property.

(1992)

If the Court please, I turn again to the status of the intervenors.

Your Honor knows that as a result of the Kaufman decision in the Supreme Court, there are about 2,000
20 additional plaintiffs in this case—2,000 additional plaintiffs who, if we fail, according to the language of the Supreme Court, are entitled to recovery in kind *pro tanto*, the stock of General Aniline and Film Corporation. These 2,000 interventions are 2,000 Section 9 (a) actions. If Your Honor strikes me down today and the Court of Appeals sustains you, this case will go on for a long time to come. It will go far beyond the extension which I am asking Your Honor to give us, but the intervenors will still be in here, striving for their rights and seeking recovery of the stock and preventing the United States Government from making any sale, until the last of the intervenors is disposed of.

So I say to Your Honor, as I said at the beginning, I have no reluctance to come to Your Honor today with this motion; my only reluctance is the inconvenience which was caused Your Honor to come from your vacation to hear us. Other than that, I never was more sincere in my life. If there ever was the occasion for a court to exercise a benign discretion in the face of the herculean efforts which have been made to comply with the order of the court, this is it.

Thank you, Your Honor.

The Court: Mr Wilson, let me ask you a question. Suppose I should reach the conclusion today that I would not extend the time; would you require any time within
21 which, as a matter of law, to apply to the Court of Appeals for an extension, if you think you could get your relief there?

Mr. Wilson: No, sir; I am prepared—

The Court: There wouldn't be any point, then, in my—

Mr. Wilson: I am going to ask Your Honor, if Your Honor rules against me, to extend the time for me to prosecute an appeal.

The Court: That is what I meant.

Mr. Wilson: But if Your Honor denies that,—

The Court: What do you think would be a reasonable time? a month?

Mr. Wilson: Well, this is what I would do—and I don't like to talk about these things, because Your Honor is—

The Court: Well, I have read the briefs carefully. You have argued in your brief, as I understand it, that the Court of Appeals had made it plain that this Court should act on the request for extension before it acted on it. That was your argument in your brief. Therefore, you had to go through this formality, no matter what my view might be.

Mr. Wilson: I don't regard it as a formality, Your Honor.

The Court: Well, I know; but go through this pro-
22 cedure, then.

What I was wondering is whether, in the event I should decide that I would not extend the time, you would need any provision in the order that motion to dismiss would not be ordered for a period of a month.

Mr. Wilson: Let me answer you this way—

The Court: I think sometimes you have to get some order to that effect in order to keep it open.

Mr. Wilson: I can perfect an appeal in 24 hours. I can apply to the Court of Appeals for an extension pending the appeal, just to keep this judgment from becoming final, the very thing Your Honor is mentioning.

Now, if Your Honor allows me just a month, I can get the record up there, but I can't get the case argued unless the Court advances it. If Your Honor is going to allow me time to prosecute an appeal, on an indication that you would not grant me an extension on the merits, then I would ask Your Honor for three months, because I would need not only the time to get my appeal up there, but to get my appeal disposed of. We are right in the middle of the summer, and I don't see—I mean, physically I

can get a record up there in no time, but when I can get three judges and perhaps the same three judges to sit is beyond my power and control.

The Court: All right.

May I ask you a question on that point. What is your view about the power or the necessity, for his taking an appeal, that this Court should suspend the time for the dismissal of the case until the Court of Appeals acts? In other words, sometimes the argument is made that if it was going to be an extension, it has to be within the time mentioned. Now, Mr. Wilson has argued—I don't know that I agree with him, but he has argued that the Court of Appeals order had been entered for the purpose of having this Court act on the motion for extension, and then it might conceivably—and he has really argued that today—reconsider the proposition if I denied it, but that they had to go through this procedure—I called it a formality—here in this Court before it would act. I did not have any such view, but I mean that is his position.

Now, suppose I were to say right now that I do not feel that I could grant a further extension of time, I don't think I ought to deprive him of the right to go up to the Court of Appeals, if he has any right at all.

Mr. Jacoby: Well, my attitude on this matter is really as follows: Naturally, I paid some attention to the possibilities which might arise. My view would be as follows: If Your Honor denies the extension today, I think the order on the mandate could be entered forthwith, tomorrow or maybe tonight. You see, the six months' period will be up today. Therefore, since no mandate, no order on the mandate has as yet been issued, if Your Honor enters an order on the mandate tomorrow, the order becomes, the order of dismissal becomes the order of this Court.

In this order of the mandate which I prepared, I included a finding that no compliance has been made.

Now, as I see it, if Mr. Wilson wants to go to the Court

of Appeals, he would have to act today, in the sense that he would have to take steps to prevent the entry of an order on the mandate.

The Court: That answers what I have in mind.

Wouldn't it be fair for the order of this Court to provide, in the event he happened to be right, Mr. Wilson, in his contention, wouldn't it be fair to say that the dismissal should not be effective until August 23rd, but should be effective then, unless the Court of Appeals had granted an extension of time, or had kept the matter open beyond that date?

Mr. Jacoby: I think the situation is that as of now, the Court of Appeals has not spoken. I interpret—and I may have mentioned this here. I interpret the action of the Court of Appeals somewhat differently from what Mr. Wilson does.

The Court: I think I do, too, but I am not sure, I am never sure, who is right until we get into the Court of Appeals.

Mr. Jacoby: May I state my position here: I feel, especially since the second order of the Court of Appeals came, that the Court of Appeals passed on the merits of the extension. The Court of Appeals undoubtedly had jurisdiction to grant—

The Court: Yes, I know. I read your brief on that.

Mr. Jacoby: The Court of Appeals undoubtedly had jurisdiction, and I notice this morning Mr. Wilson hasn't denied that. The Court of Appeals had jurisdiction to grant an extension by recalling or modifying the mandate. The Court of Appeals did not do that. Rather, it added, it denied the motion, adding the proviso that Mr. Wilson has a right to file a motion here.

I interpret that to mean that the Court of Appeals is willing to have you pass on such a motion in accordance with the views, that you, as the trier of the facts, are more familiar with the matters; and then, if there should be a ruling on your part, let's say that you would recommend

an extension, then the Court of Appeals today might be willing to grant an extension or consider the question of an extension.

But if Your Honor now denies the extension, I
26 cannot see how Mr. Wilson can say, "I take that up again." I think the only thing which Mr. Wilson could take up is, if he makes a motion, this very minute, possibly, to vacate the dismissal because he has complied.

Now, as I see the situation, if I may hand you proposed orders which I drafted with that in mind (handing up papers to Court), I have an order here on the motion for reconsideration. If Your Honor denies Mr. Wilson's motion for reconsideration, we reach the point that the six months' period is about to expire. Once that point has been reached, the order on the mandate can be entered by this Court, and in the draft order on the mandate which I prepared, there is a finding that no compliance has been made within the six months' period.

May I please submit the order.

The Court: Well, I don't see why, in order to vouchsafe him an appeal beyond any doubt whatever, it would not be fair to say the motion to dismiss becomes effective a month hence, unless the Court of Appeals grants extension of time or otherwise modifies this order; and then there would not be any doubt at all about it. Because if I should have been arbitrary or capricious in denying this, then they could have acted on it, and the case would not be dismissed.

Mr. Jacoby: Well, of course, I don't want to argue
27 against—

The Court: I think that is what I will have to do. I don't think you need to argue the other point. I have thought it over very carefully. At the end of more than seven years now, I just find no assurance whatever that these papers that we have ordered to be produced will be produced. I don't see how the plaintiff is going to be

(1998)

able to comply with that order so long as the Government of Switzerland continues its confiscation of the papers.

Now, under the laws of the United States, there is no provision whatever for a neutral to decide what papers are relevant or what are not, in reference to this case, and under the applicable rules of the United States courts, there is no requirement that any party to a case should be forced to proceed by way of letters rogatory to obtain documents in custody of one of the parties. I think it very well may be unfortunate that the plaintiff must be deprived of its trial by reason of the laws of another nation and the acts of its representatives. I must confess I have quite a little sympathy for counsel for plaintiff, because I know that counsel have worked extremely hard to comply with the order, and I have made a formal finding that they acted in good faith, including the plaintiff. But the procedural laws of the United States, as well as the substantive laws, may not be relaxed upon its courts because of difficulties a party may have with a different sovereign power.

In my view, nothing short of a complete release of the papers by the Government of Switzerland, leaving this court or its representative in a position to decide what is relevant or what is to be produced, will comply with our laws. I simply don't see how I would have any right whatever to permit a neutral to come in here to take the place of this court or its special master. If I did that, I think that would write something new into the rules of the court; and that is as far as we have gotten at the end of now seven years.

In 1953, I established the pattern of granting the time. I think I first granted three months, and according to your memorandum, I believe I extended that up to seven months; didn't I?

Mr. Jacoby: Yes, Your Honor.

The Court: And then the Court of Appeals has given them six months, gave that two years later.

(1999)

It seems to me, under those circumstances, I am just causing the plaintiff a whole lot more work, and vain work, and unhappiness by extending the time, and if I did extend it, I would be doing something entirely futile; so that I am firmly convinced that I should not extend the time.

Now, I do feel that in view of the position taken
29 by Mr. Wilson that the Court of Appeals ruled, in effect, that this Court should first pass on the matter and then perhaps it would pass on it again, in view of his position, I may say, I don't know that I agree with him at all on that, but that is his position, and in my anxiety to vouchsafe him every possible relief in the appellate court, I will enter an order today denying this plaintiff's motion to extend the time for the production of documents as ordered on July 5, 1949, with a provision that this case will stand dismissed as of August 23, 1956, that is one month from today, unless the United States Court of Appeals for the District of Columbia, on or before that date, August 23, 1956, shall order a further extension of time for the production of documents, or otherwise shall enter an order amending the order of this Court as of today.

That means that unless the Court of Appeals puts something in this record within a month, this case is finally dismissed. I think that is the best I can do for plaintiff.

Mr. Wilson: Will Your Honor hear me on that technically a moment?

The Court: I will hear you on the technical point; but you see, they can come in there with any one of their—I mean if their judges want to give another two months or three months, they can come in there. But I will hear you on it, of course.

30 Mr. Wilson: Before coming to the technical point, I fully realize that counsel should never catechize the court on any subject; but in order to clarify my thinking: In the appellate court, does Your Honor rule that all the Sturzenegger Bank documents are covered by your order?

The Court: Oh, no. My ruling is that the determination

(2000)

of what I did order may not be made by a neutral, selected in part by the Government of Switzerland. I frankly feel in my own judgment if you had succeeded in making it possible for Special Master Hughes to pass on the relevancy of those documents and possibly let this Court rule on some that there might be some doubt about, then I would have felt differently about it. But I cannot bring a neutral in here. I mean we don't start letting neutrals or some foreign nation rule on what is relevant in our courts.

Mr. Wilson: It might be an American. I have carefully said in the memorandum a neutral does not necessarily mean foreign.

The Court: I don't think any neutral selected by Switzerland,—if it is an American, it has got to be one that this court selects, a representative of this court.

Mr. Wilson: Well, you have the veto power, and so have the defendants.

31 The Court: I know.

Mr. Wilson: This must be an individual acceptable to everybody.

The Court: Well, my view is, I would rule as a matter of law that the Government of Switzerland has absolutely nothing to do with the production of these papers, so far as our courts are concerned. I don't say that by way of being rude to the Government of Switzerland, but we just cannot let them get into our affairs, any more than we could let any other government tell us what we should do in regard to carrying out our rules.

Mr. Wilson: Your Honor, I appreciate your—

The Court: I think in view of your difficulties and good faith, if you had got Colonel Hughes the right to look at those papers as a representative of this court, appointed by this court, and say which ones were absolutely immaterial and which were not, I might have gone along with it; but that is off the cuff. I don't know, but I think I might have. I have thought that over in connection with this.

(2001)

But I don't rule that every scrap of paper in Sturzenegger's files had to be produced. I have always had in mind that we ought to look at the same things that the Government of Switzerland looked at. I have always had that in mind.

Mr. Wilson: I dare say with the 192,000 documents they will be doing just that.

32

The Court: I don't think so.

Mr. Wilson: Well, the record is not clear on that point, that a full production of the Sturzenegger papers would not require 100 per cent production of the bank's documents.

The Court: I don't think I have to specifically rule on that. I have not studied that phase all the way through. Now, of course, what is relevant and what is not is a broad term. On your production of records, it is only what is relevant to the trial of the case or what is admissible, as we all know. Under those rules, if that leads to other information—

Mr. Wilson: But Your Honor, I don't know of any that I am about to speak to, but Your Honor's order is so restricted here that there could be relevant documents which are not even required to be produced under Your Honor's order as far as it affects us, unlike the order as it applies to the United States Government where you said, "all documents that are relevant."

The Court: Well, you see, here, the ruling that I am making today is perfectly simple. At the end of seven years, we have confiscation. We have Switzerland saying it is going to have its say, either by way of selecting a neutral or by way of selecting some other pro-

33

cedure, as to determining what we are going to get here. It is going to have some say. Now, there is no provision like that in the laws of the United States. That is my ruling.

Mr. Wilson: The purpose of my question is simply to say that I think we have made substantial compliance.

(2002)

The Court: Well, substantial is not enough.

Mr. Wilson: Then give us more time, and we will make full compliance.

The Court: In the Uebersee case there was one letter that almost decided the entire case. That came in at the end of I don't know how many years, four or five years.

Mr. Wilson: As I said to Your Honor earlier today, there could be a thousand letters here not covered by this order.

The Court: I understand.

Mr. Wilson: Now, Your Honor, thank you for discussing that with me. Let me come to the technical side of the situation.

In the first place, I don't think any order is necessary on this mandate. I think it is a self-operating mandate of the Court of Appeals. In the opinion of the Court of Appeals, an order would have been necessary. Let me contrast—and I tried, I asked the Court of Appeals to straighten this out last January, and they ignored
34 me upon the subject. The opinion says this:

"One modification, however, we deem advisable: namely, that dismissal of the complaint with prejudice shall not become effective until six months after the receipt by the District Court of the mandate of this court in this case, and not then if within such period discovery is made as ordered. This will afford another opportunity to bring the case on for a trial and decision on the merits." And mind you, Your Honor:

"The dismissal of the complaint with prejudice shall not become effective until six months . . ."

When they wrote their judgment, sent it down here in the mandate, they phrased it differently. They said:

"On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court appealed from in this cause be and the same is hereby affirmed, provided, however, that if within six months after the receipt by the District Court of the mandate of

this court in this case discovery shall be made as required by the District Court, then the order dismissing the complaint shall be granted by the District Court."

In other words, they turned it right around and
35 they made it effective, subject to a motion to vacate.

Now, this concept of Mr. Jacoby that tomorrow he must bring Your Honor, would have had to bring Your Honor an order on the madate entering the dismissal, because no motion to vacate had been filed, is an unnecessary gesture. The mandate is self-executed.

Let me tell you where this leads me to. Based on Your Honor's determination not to give me an extension of time, I have two courses open to me. I can ask Your Honor for an order today to that effect, which would be an appealable judgment, because we have learned since 1948, and the Court of Appeals has said half a dozen times, that Section 1291 of the judicial code speaks about final decisions, not final judgments, not final orders. Those are the appealable things.

Now, if Your Honor denied my motion for an extension, or my motion for reconsideration, that would be an appealable situation forthwith. If your Honor extends the time, and I won't be dismissed for a month hence, I wonder if I have got an appealable position, whether my choice then is not to move in the Court of Appeals for reconsideration of its denial.

The Court: Well, maybe you are right about that. I am perfectly willing to sign it in the form that he sup-
36 plied it there, which does make a finding, I mean denies the motion to extend. I thought I was doing you a service, but maybe—

Mr. Wilson: Your Honor, I think you are, but I have got to be sensible about where I go.

The Court: —maybe I am not.

Mr. Wilson: You see, if I am going to appeal from your decision of July the 11th, it will be more than thirty days

by the time this comes down.

Will Your Honor do this. This is a very crucial decision. Will Your Honor give me a half hour to decide the course to take?

The Court: Oh, sure.

Mr. Wilson: That I may have the election of either—

The Court: Surely.

Let me see that first order you had. I have it right here.

Mr. Wilson: If Your Honor signed the first order, it ought to have a 54 (b) certification in it so I have got an appealable position.

The Court: Very frankly, of course, my own judgment in the matter is, I probably ought not to venture this, but that if I signed this order, you would not be prejudiced, anyway. I don't think you have got to get it within
37 the time. If I am arbitrary and capricious in the exercise of the discretion—and this is a discretion, I imagine—then they could act on it at any time.

Mr. Wilson: Except that Your Honor knows that thirty-day appeal provision is jurisdictional.

The Court: I mean his order in this form.

Well, you let me know.

Mr. Wilson: Will Your Honor be in the courthouse for the next half hour?

The Court: Yes; I will be here for more than that. I will be here for several hours, maybe all day. All right. You gentlemen confer.

All right. Till further notice.

(Whereupon, at 11:35 a.m., the Court took a recess till further notice, thereafter returning at 12 o'clock noon.)

Mr. Wilson: May it please the Court, we have decided that procedurally, we would prefer that Your Honor sign an order denying our motion, with a 54 (b) certificate in it, and my order is the same as Mr. Jacoby's, except for the 54 (b) certificate, so that I may begin the prosecution of an appeal, at 12 o'clock today, sir. (Handing paper up to Court)

(2005)

The Court: That 54 (b) is all right, isn't it?

Mr. Jacoby: Well, Your Honor, 54 (b), I have no
38 objection to 54 (b), in view of the fact that there are intervenors in the case. However, in addition to this order, I still submit that Your Honor sign an order on the mandate.

Now, Mr. Wilson's plan would not be any order on the mandate, and tonight the six months' period in it, specified in the order of the Court of Appeals, expires. Therefore, I submit that in addition to this order, Your Honor sign either the proposed order on the mandate, which I handed to you,—may I hand it back—(Handing paper to Court)

Mr. Wilson: Your Honor, the time to sign the order on the mandate, according to Mr. Jacoby's theory, has not expired. It won't expire until either midnight tonight or midnight tomorrow tonight, and it will be premature to sign it before then.

Mr. Jacoby: Well, Your Honor, I am willing to submit another order on the mandate, in order to overcome Mr. Wilson's question of this afternoon. I have an order here which subsequently I would like to substitute, substitute an order on the mandate not having the clause in there about no compliance having been made within the six months. Now, may I hand this to you. (Handing paper to Court)

Mr. Wilson: But no order on the mandate, even according to your theory, is in order until the time has expired.

Mr. Jacoby: That is not true. The question is
39 whether His Honor could sign the finding that there was no compliance today or would have to wait until tomorrow.

Mr. Wilson: If Your Honor please, let me tell Your Honor what I am going to do. And I am saying this in addressing myself to what Mr. Jacoby has just referred to. I will file an appeal in the Court of Appeals in the next two hours. I will file a petition in the Court of Ap-

peals for an extension of the time, pending disposition of the appeal. I don't think there should be any order on the mandate until I have had an opportunity to present this matter to the Court of Appeals.

Mr. Jacoby: May I just say a word on that. I don't think the question that Mr. Wilson—

The Court: It doesn't amount to too much. If there is any question about the expiration of the time, why don't I date this tomorrow and file it tomorrow.

Mr. Wilson: The order of the mandate?

The Court: Your order. Then you can send in a form dismissing it any time after that you want. It is all right with me. The Court of Appeals has acted. I know what you are talking about. The clerk probably would want it, anyway, but you can send it in in several weeks. It doesn't make any difference.

Mr. Jacoby: Do I understand you right, Your Honor? Which order on the mandate do you—

The Court: I can take either one of them. I can take the one Mr. Wilson drew and just put in here,—

Mr. Wilson: Mine is not on the mandate, Your Honor. I have no order on the mandate.

The Court: I mean the one you have got here.

Mr. Jacoby: Those are both my orders, alternate orders on the mandate.

The Court: Let's date this the 24th.

Mr. Wilson: Wait just a minute, Your Honor. My order you will date today, please. I mean I don't have a mandate order. I want to get to the Court of Appeals before the six months are up.

The Court: I will tell you what you do. I will sign this order that you handed up here today, so you can go to your Court of Appeals.

Mr. Wilson: That is right.

The Court: And then you send me an order as soon as the Court of Appeals has acted, finally dismissing the case, and I will take care of it.

Mr. Jacoby: And what about the order on the mandate?

(2007)

The Court: I say, send me the order—I will sign this today just in this form in which you handed it up. Then I think our clerk would want one, anyway, after
40 a while. But give him his time to go up to the Court of Appeals, and then when he comes back after having acted, if it does not extend the time, you send your order on in here for the entry of the mandate and a final dismissal on the mandate. You can do that just as soon as he gets through in the Court of Appeals.

Mr. Jacoby: Well, Your Honor, I even have a doubt whether Mr. Wilson's rights are protected in that way, because—

Mr. Wilson: Well, let me worry about that, Mr. Jacoby.

Mr. Jacoby: I understand Your Honor wanted to protect Mr. Wilson's rights, his right to go to the Court of Appeals. There isn't any final order in the picture under this plan for which Mr. Wilson can appeal.

The Court: Well, he thinks there is. His argument is that the way the mandate reads was, as it finally came down, that the case be dismissed in this court unless the files had been received; so that he says that that is operative in and of itself. The mandate has been filed here; hasn't it?

Mr. Jacoby: The mandate was filed on the 24th of January. Now I want to say I don't see what objection there is to filing one of the two orders on the mandate—

The Court: I don't think so, either, but if there is, you don't have any problem about it. Just let him get
42 through with his wrestling up there, and then come back down here, and I will sign the order dismissing it. It won't be any trouble if they turn him down, because I think, as I say, our clerk will want that, anyway. They always do. Just come back. I will be around. I will be in here again Friday. If they have already acted on it, he will just have it in here Friday.

Mr. Jacoby: May I leave the order on the mandate with you, then; and is it understood with Mr. Wilson that we are going to the Court of Appeals immediately,—

(200)

The Court: He is going up there today.

Mr. Wilson: Just as soon as you stop talking, Mr. Jacoby.

The Court: I will sign this. I will file your supplementary one a little later on. Let him get through in the Court of Appeals.

Mr. Wilson: Your Honor, before you leave the bench, since I will ask the Court of Appeals today to extend the six months, while I prosecute the appeal, I will have to tell them that I applied to you to extend the six months until I prosecute the appeal. I assume you are going to deny it. In other words, I now have a final appealable judgment with a certificate, and in order that the dismissal shall not be final, and in order that I may not have lost my right to vacate, I am going to ask the Court
43 of Appeals to extend the time pending disposition of my appeal.

Now, in order to do that, I must be able to tell them that I first asked Your Honor to extend the time for the judgment to become final, and for my time to vacate to be allowed until the disposition of the appeal in the Court of Appeals.

The Court: That is what I thought I told you a moment ago.

Mr. Wilson: No, that is the other way around. I want my judgment first. Then I want to apply to Your Honor for the effect of a stay while I prosecute an appeal from that judgment.

The Court: Let me see. You see, here is your point. You come back to his situation, as I see it. I thought your argument this morning was that the Court of Appeals, by its mandate, had indicated that judgment must be entered dismissing the case, unless these were received. Now, that is its order. I thought you said, and I thought it was the basis of your argument against him today, that in view of that, it wouldn't be necessary for me to make an order dismissing the case. That is what I thought you said. In

(2009)

other words, the order of the Court of Appeals accomplishes it.

Now, I am not going to say anything at all about its order. If that is true, I will just let it stand.

44 Mr. Wilson: Your Honor, these are two different things. What you do on the mandate when the time arrives for you to do something on the mandate is one question. The time has not arrived, and indeed I think the time will not arrive before Wednesday morning, at the earliest, as I read the cases. The six months expire at midnight tomorrow night.

Now, your order now denying me an extension, with a 54 (b) certificate, is a final order and is appealable. I am now going into the Court of Appeals with a general appeal from the order which Your Honor just signed, and I am going to take the position, as Your Honor indicated—and please forgive me; I am not trying to be presumptuous—

The Court: I am following you. Go ahead.

Mr. Wilson: —that Your Honor has abused a judicial discretion in not extending the time. I am going to prosecute a brand-new appeal in this way. When I get there this afternoon, I am going to ask the judges who hear me to extend the time of this mandate so that its finality is not completely crystallized until they may dispose of my appeal assailing your judgment in not giving me an extension.

Now, the parallel to that in converse is a stay order in an injunction case, where Your Honor, if I had an application for injunction, would deny it. Maybe something is going to happen to me tomorrow, so I go up this

45 afternoon with a "fast record," as they call it, and I ask the court up there to stay this, pending appeal.

Now, this is the same thing, except as to the extension of time.

The Court: I see what you mean. All right, you apply to me for that stay, and I think I ought to deny it. I think that would be the better way to do it. Then, if they don't stay it, you can come in here Thursday with your order.

(2010)

Mr. Wilson: Thank you, Your Honor.

Now, I hand Your Honor an order to allow the original records, court records, to go to the Court of Appeals. (Handing paper up to Court) This is to be certified by the clerk.

The Court: No objection to that, is there?

Mr. Jacoby: No objection.

The Court: All right.

Mr. Wilson: And I hand Your Honor an order allowing me to deposit $250 cash in lieu of the cost bond on appeal.

The Court: Is that all right? You can always send any orders up to me in the country if you want to. I have got to go to New York on business over this week-end, but I will be back there Saturday night.

All right.

Mr. Wilson: Thank you, Your Honor, very much.

(Whereupon, at 12:10 p.m., the hearing was ended.)

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46 Filed July 30, 1956

Plaintiff's Motion to Vacate Order of Dismissal

Comes now the plaintiff, by its undersigned attorneys, and moves the Court (Chief Judge Laws) to vacate its order of December 21, 1953, dismissing the complaint.

In support of this motion, plaintiff submits the letter of its counsel to counsel for defendants, dated July 30, 1956, and identified by the accompanying affidavit of John J. Wilson, as well as the affidavits previously filed herein describing records which have been produced.

(Signatures of Attorneys for Plaintiffs)

(2011)

Filed July 30, 1956

Affidavit in Relation to Annexed Motion

DISTRICT OF COLUMBIA, SS:

I, John J. Wilson, do solemnly swear that in the forenoon of today, July 30, 1956, a letter was delivered to the office of Sidney B. Jacoby, Esq., attorney for defendants, in the City of Washington, D. C., a true copy of which is attached hereto and made a part hereof.

/s/ JOHN J. WILSON

Subscribed and sworn to before me this 30th day of July, 1956.

/s/ VERA McG. SIMPSON
Notary Public, D. C.

Filed July 30, 1956

LAW OFFICES
WHITEFORD, HART, CARMODY & WILSON
815 FIFTEENTH STREET, NORTHWEST
WASHINGTON 5, D. C.

July 30, 1956

Mr. Sidney B. Jacoby,
Attorney, Office of Alien Property,
101 Indiana Avenue, N. W.
Washington, D. C.

Re: *Chemie* v. *Brownell*

Dear Mr. Jacoby:

The Greutert/Sturzenegger documents heretofore described to you in various affidavits filed in court, and aggregating about 192,000, are hereby tendered you for inspection at our offices, beginning immediately today.

(2012)

The Greutert/Sturzenegger books, as outlined in our Supplemental Memorandum filed in the Court of Appeals on July 12, 1956, are hereby tendered you for inspection at the Bank's headquarters in Basel, Switzerland, also beginning forthwith.

These inspections may be had pursuant to and in compliance with Chief Judge Laws' order of July 5, 1949.

We are today filing the enclosed motion to vacate Chief Judge Laws' order of December 21, 1953, dismissing our complaint, if he shall find that by these tenders discovery shall be made as required by him.

Very sincerely yours,

JOHN J. WILSON

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48 Filed July 30, 1956

Memorandum in Support of Annexed Motion

By order dated July 24, 1956, the United States Court of Appeals amended its judgment and mandate in its case No. 12,140, so that they now read as follows:

"On consideration whereof, it is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed, provided, however, that if on or before July 30, 1956, discovery shall be made as required by the District Court, then the order dismissing the complaint shall be vacated by the District Court."

Greutert/Sturzenegger records have been tendered to defendants for inspection, as per the annexed affidavit and exhibit.

The District Court should now determine by appropriate hearings and findings whether discovery has been made as

(2013)

2013

required by it. If it has, then the order dismissing the complaint should be vacated.

Respectfully submitted,

(Signatures of Attorneys for Plaintiff)

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49 Filed July 30, 1956

Memorandum in Opposition to Plaintiff's Motion to Vacate Order of Dismissal

Defendants, by their undersigned attorneys, oppose plaintiff's motion to vacate this Court's order of dismissal of December 21, 1953.

Plaintiff's motion, we submit, is clearly without merit. By its opinion delivered from the Bench on July 23, 1956, this Court (Chief Judge Laws) has in effect denied the present motion. The "tender" of the Greutert/Sturzenegger books made today in Mr. Wilson's letter to defendants' counsel merely is the second submission of a plan which was previously rejected by this Court. We call the Court's attention to the following paragraph in Mr. Wilson's "tender":

"The Greutert/Sturzenegger books, *as outlined in our Supplemental Memorandum filed in the Court of Appeals on July 12, 1956*, are hereby tendered you for inspection at the Bank's headquarters in Basel, Switzerland, also beginning forthwith." (Italics added)

Plaintiff's supp mental memorandum to the Court of Appeals of July 12, 1956—filed in this Court as an attach-

(2014)

ment to its motion for reconsideration dated July 16, 1956—contains the plan for a neutral person pledged to Swiss secrecy to determine the relevancy of the books. That plan does not constitute a tender and was decisively rejected by this Court (Transcript, July 23, 1956, pp. 27 ff.) as not being in compliance with this Court's order.

In its memorandum in support of the motion plaintiff urges that the Court "should now determine by appropriate hearings and findings whether discovery has been made as required by it." Under Rule 9(f) of the Local Rules of this Court no oral hearing should be allowed on the present motion to vacate. This Court, in effect, *did* grant plaintiff an extensive hearing on July 23, when it fully considered plaintiff's present plan described above. Similarly, findings are not necessary on the decision of the present motion to vacate.* In any event, findings are contained in the opinion of this Court delivered on July 23, 1956.

In support of our opposition, there is attached hereto an affidavit of Sidney B. Jacoby, one of counsel for defendants. We also enclose a proposed order denying the present motion to vacate the dismissal. We respectfully urge this Court to sign the proposed order upon the mandate which we submitted earlier today by letter before plaintiff served its present motion to vacate the dismissal.

Respectfully submitted,

DALLAS S. TOWNSEND
Dallas S. Townsend
Assistant Attorney General
Director, Office of Alien Property

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* See F.R.C.P. Rule 52(a), last sentence: "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

(Signatures of Counsel for Defendants)

July 30, 1956

51a Filed July 30, 1956

Affidavit

Washington, District of Columbia ss.

SIDNEY B. JACOBY, being duly sworn, deposes and says:

I submit this affidavit in support of defendants' memorandum, July 30, 1956, in opposition to plaintiff's motion to vacate. I incorporate herein by reference my affidavit dated June 26, 1956, filed with the Court of Appeals, a copy of that affidavit having been filed in this Court as an exhibit to defendants' memorandum of July 17 in opposition to plaintiff's motion for reconsideration of the order of July 11.

(2016)

Since June 26 plaintiff has submitted further affidavits. Nothing in those affidavits causes me to change the statements in my earlier affidavit.

SIDNEY B. JACOBY
Sidney B. Jacoby

July 30, 1956

Sworn to before me on this
30th day of July, 1956.

(SEAL) JOSEPHINE A. STERLING

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52 Filed July 31, 1956.

Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion to Vacate Order of Dismissal

Again, defendants have misinterpreted our tender regarding the Greutert/Sturzenegger Bank books.

We rely upon the first paragraph in plaintiff's supplemental memorandum to the Court of Appeals of July 12, 1956—filed in this Court as an attachment to its motion for reconsideration dated July 16, 1956. The neutral person has nothing to do with that paragraph.

Respectfully submitted,

(Signatures of Attorneys for Plaintiff)

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53 Filed August 6, 1956

Order Upon Mandate of the Court of Appeals

This Court having dismissed on December 21, 1953, plaintiff's complaint with prejudice, and having received

on January 24, 1956, the mandate of the United States Court of Appeals for the District of Columbia Circuit affirming said order of dismissal, providing, however, that if within six months after the receipt by this Court of the mandate of the Court of Appeals in this case discovery shall be made as required by the order of this Court of July 5, 1949, then the order dismissing the complaint shall be vacated, and

The Court of Appeals having ordered on July 24, 1956, solely in order to preserve the status quo while plaintiff's motion for an extension of time was under advisement, that its mandate be amended so that the said order of this Court of December 21, 1953, be affirmed, provided, however, that if on or before July 30, 1956, discovery shall be made as required by the said order of this Court of July 5, 1949, then the order dismissing the complaint shall be vacated by this Court, and

54 The Court of Appeals having on July 27, 1956, entered an order denying any further extensions beyond July 30, 1956, for compliance with said discovery order of this Court, and

It appearing that there has been no compliance by plaintiff with said discovery order of this Court on or before July 30, 1956,

Now, it is hereby this 3rd day of August, 1956, ordered, adjudged and decreed that the said mandate, as amended, be, and it hereby is, made the order of this Court, and it is further ordered, adjudged and decreed that plaintiff's complaint herein stands dismissed with prejudice.

/s/ BOLITHA J. LAWS
Chief Judge

(2018)

55 Filed August 7, 1956

Motion by Plaintiff to Vacate Order of Dismissal Dated August 3, 1956

Comes now the plaintiff, by its undersigned attorneys, and moves the Court (Chief Judge Laws) to vacate, set aside and hold for naught the "Order upon Mandate of the Court of Appeals," dated August 3, 1956 and filed herein August 6, 1956, adjudging that plaintiff's complaint stands dismissed with prejudice, upon the following grounds:

(1) The Court should not have entered such an order while there was pending in the United States Court of Appeals a petition for a rehearing *in banc* in respect of the order of the Court of Appeals of July 27, 1956 relating to the date of July 30, 1956.

(2) The Court should not have entered such an order until it first acted upon plaintiff's motion, filed herein July 30, 1956, to vacate the order of dismissal of December 21, 1953.

(3) The Court should have held hearings and made findings whether discovery has been made as required by it.

(4) The Court acted arbitrarily in respect of the foregoing.

(5) The recitals in the third and fourth paragraphs of said order of August 3, 1956 are contrary to the fact and therefore erroneous.

56 (6) A very substantial compliance with the discovery order of July 5, 1949 has been tendered. The documents accompanying plaintiff's motion of July 30, 1956, to vacate the dismissal order of December 21, 1953 are incorporated herein by reference and made a part hereof. The mandate of the United States Court of Ap-

(2019)

peals requires the District Court, *sua sponte*, under the circumstances, to vacate the order dismissing the complaint, and, therefore, to vacate the order of August 3, 1956.

(7) The Court abused its judicial discretion and acted arbitrarily and capriciously in refusing to extend the time prescribed in the mandate of the United States Court of Appeals. Specifically, the Court so acted by its orders of July 11 and July 23, 1956.

(8) The order of August 3, 1956 is contrary to law in that, *inter alia*, it is based upon an improper refusal to extend the time prescribed by the United States Court of Appeals in its judgment and mandate.

(Signatures of Attorneys for Plaintiff)

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57 Filed August 7, 1956

Memorandum in Support of Annexed Motion to Vacate

Plaintiff has filed a motion to vacate the order of August 3, 1956—filed August 6, 1956—upon the mandate of the United States Court of Appeals and dismissing the complaint with prejudice.

Plaintiff's motion, filed June 20, 1956, for an extension of the time prescribed in the judgment and mandate of the United States Court of Appeals, and subsequent papers filed herein, fully explain the events leading up to the instant motion.

The Court heard argument on July 23, 1956 and denied an extension. From such denial, an appeal was perfected on that date to the United States Court of Appeals and

(2020)

the record docketed therein, consisting of all papers filed herein beginning with June 20, 1956. Pursuant to order of this Court, the original papers were permitted to be transmitted to the appellate court.

That appeal is pending, undisposed of on the merits, the time to file briefs not having expired.

58 On July 30, 1956, plaintiff tendered to defendants for inspection such quantities of records of the Greutert/Sturzenegger Bank as to constitute substantial compliance with the discovery order of July 5, 1949, and moved to vacate the dismissal order of December 21, 1953. The Court has not acted upon that motion.

Instead, the Court signed an order upon the mandate, adjudging that plaintiff's complaint be dismissed with prejudice. The grounds are fully set forth in the motion and will not be repeated herein.

Implicit in the final dismissal order of August 3, 1956 is the fact that the Court refused to grant plaintiff an extension of time, based upon a showing of vast production and a plan for whatever further production might be necessary under the circumstances. Plaintiff respectfully submits that the Court acted arbitrarily and abused its discretion in denying such an extension. If the extension had been granted, the instant dismissal order would not have been entered. Therefore, it was error to enter a dismissal order based upon the improper refusal to extend the time, and the order should be vacated.

The order should be vacated, as well, for the other reasons stated.

In support of and/or in relation to this motion, plaintiff incorporates herein and makes a part hereof the documents filed in the United States Court of Appeals in case No. 13460 in that Court which are listed as items 1-9, both

inclusive, in the Designation of Record filed by plaintiff herein on July 23, 1956.

Respectfully submitted,

(Signatures of Attorneys for Plaintiff)

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59 Filed August 13, 1956

Memorandum in Opposition to Plaintiff's Motion to Vacate Order of Dismissal Dated August 3, 1956

Defendants, by their undersigned attorneys, oppose plaintiff's motion to vacate this Court's "Order upon Mandate of the Court of Appeals," dated August 3, 1956, and filed on August 6, 1956.

The plaintiff's motion, we submit, is clearly without merit. We will comment separately on each of the eight numbered paragraphs of the motion.

(1) Plaintiff argues that this Court should not have entered the order while there was pending in the Court of Appeals plaintiff's petition for a rehearing *in banc* in respect of the order of the Court of Appeals of July 27. The Court of Appeals has itself answered this point. Plaintiff's petition in the Court of Appeals sought a rehearing *in banc and* a further extension of time by way of an amendment of the mandate to preserve the status quo pending the disposition of the petition for a rehearing

60 *in banc*. The Court of Appeals on the very next day *sua sponte* denied the portion of plaintiff's petition seeking a further extension of time. Order of the

(2077)

Court of Appeals dated July 31. This is clear indication by the Court of Appeals that proceedings in the District Court are not to be delayed until disposition in the Court of Appeals on the matter of the rehearing *in banc*.

(2) This Court was correct in entering its order of dismissal on the mandate prior to acting upon plaintiff's motion of July 30, 1956, to vacate the order of dismissal of December 21, 1953. The mandate of the Court of Appeals, as amended, required plaintiff to comply fully by July 30, 1956, with this Court's production order of July 5, 1949. There was no compliance, as this Court ruled in its oral opinion of July 23 and in its order on the mandate. The final date for compliance having passed without plaintiff having made the required discovery, the Court's order upon the mandate was thus an inevitable statement of the consequence of plaintiff's failure.

(3) This Court was not required to hold hearings and make findings beyond the hearings and findings it did hold and make. The Court granted plaintiff a full hearing on July 23, 1956, and there considered the sufficiency of the production offered by plaintiff in compliance with the orders for discovery. The Court found that production insufficient and it so ruled in its opinion of that day. Findings, though in law not necessary,[1] were thus in fact made.

61 (4) Plaintiff's fourth charge is, in toto, that "The Court acted arbitrarily in respect of the foregoing." This deserves no answer but is in fact answered above. The entry of the order on the mandate was not in the least arbitrary but rather a necessary and orderly ending of the matter.

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[1] This very same question arose in this case in December of 1953 when the Court ruled that compliance had not been made and entered the order of dismissal of December 21, 1953. Plaintiff then (as now) objected on the ground that findings were necessary and had not been made. We then showed to the Court, and to the Court of Appeals on the appeal, that findings were unnecessary under Federal Rules 52(a) and 41(b).

(2023)

(5) Plaintiff contends that the third and fourth paragraphs of this Court's order on the mandate are "contrary to fact and therefore erroneous." This is not so.

The two challenged paragraphs are recitals. The third paragraph of the Court's order reads:

"The Court of Appeals having on July 27, 1956, entered an order denying any further extensions beyond July 30, 1956, for compliance with said discovery order of this Court,"

This was a patently correct recital of the order of the Court of Appeals, in its own words, "ORDERED . . . that any further extension of time beyond July 30, 1956, for compliance with said order of discovery be . . . denied."

The fourth paragraph of this Court's order on the mandate reads:

"It appearing that there has been no compliance by plaintiff with said discovery order of this Court on or before July 30, 1956,"

In alleging that this was contrary to fact the plaintiff is merely asserting that this Court erred in its ruling that compliance has not been made. Of course, it is plain that compliance has not been made, and the Court was correct.

62 (6) Plaintiff alleges it has made "a very substantial compliance," as outlined in the hearing of July 23.[2] This Court has ruled that "substantial is not enough" (Transcript, July 23, 1956, p. 33; cf. pp. 31-33) and has explained its reasons, recently and at great length in its earlier opinions, affirmed in the Court of Appeals.

(7) & (8) Plaintiff in paragraph (7) asserts that the Court erred in not granting an extension of time (*i.e.* that

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[2] The degree of compliance was first described in plaintiff's memorandum of July 12 in the Court of Appeals, filed as an attachment to plaintiff's motion for reconsideration in this Court on July 16, thereafter cited in plaintiff's motion of July 30, and now finally incorporated by reference in the instant motion to that motion of July 30. The whole matter was orally argued before the District Court on July 23.

the Court's orders of July 11 and 23 were in error). And in paragraph (8) plaintiff says that "therefore" the order of August 3 on the mandate was illegal. The assertion is thus a single one—that the Court erred in not granting plaintiff extensions of time.

The Court most certainly did not err in refusing any further extensions of time. There was no reason for extensions to be added to the many years of delay and non-production. As the Court observed "At the end of more than seven years now, I just find no assurance whatever that these papers that we have ordered to be produced will be produced." (Transcript, July 23, p. 27).

63 CONCLUSION

The plaintiff's motion to vacate the order on the mandate contains no more than a series of allegations that the Court erred. The motion to vacate should be denied.

We attach for the consideration of the Court a draft order of denial.

Respectfully submitted,

(Signatures of Attorneys for Defendants)

(2025)

65 Filed August 21, 1956

Order

Upon consideration of plaintiff's motion dated July 30, 1956, to vacate the order entered by this Court on December 21, 1953, dismissing the complaint, upon consideration of defendants' memorandum in opposition thereto, dated July 30, 1956, and it appearing that plaintiff has failed to comply with this Court's order of production within the time specified in the mandate of the Court of Appeals, as amended, it is hereby this 21st day of August, 1956,

ORDERED that the motion of plaintiff be, and it hereby is, denied. This order is to be effective as of August 3, 1956.

B. J. LAWS
Chief Judge

August 21, 1956

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66 Filed August 21, 1956

Order Denying Motion by Plaintiff to Vacate Order of Dismissal Dated August 3, 1956

Upon consideration of plaintiff's motion of August 7, 1956, to vacate this Court's "Order upon Mandate of the Court of Appeals" dated August 3 and entered on August 6, 1956, and upon consideration of defendants' memorandum in opposition thereto, dated August 13, 1956, it is hereby this 21 day of August, 1956,

ORDERED that the motion of plaintiff be, and it hereby is, denied.

The Court, expressly determining under Rule 54(b), Fed. R. Civ. P., that there is no just reason for delay, hereby expressly directs that final judgment be entered

in respect of the Court's order dated August 3, 1956, and in respect of this order.

BOLITHA J. LAWS
Chief Judge

SEEN:
JOHN J. WILSON
Attorney for Plaintiff

(2027)

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 348

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ETC., PETITIONER,

vs.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND IVY BAKER PRIEST, TREASURER OF THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 6, 1957
CERTIORARI GRANTED OCTOBER 14, 1957

VOLUME VI

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IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12140

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., ETC., Appellant,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL., Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Mr. John J. Wilson, with whom Mr. Roger J. Whiteford was on the brief, for appellant.

Assistant Attorney General Townsend, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, and Mr. David Schwartz, Attorney, Department of Justice, with whom Messrs. George B. Searls, Sidney B. Jacoby, Paul E. McGraw and Ernest S. Carsten, Attorneys, Department of Justice, were on the brief, for appellees.

Before: WILBUR K. MILLER, FAHY and DANAHER, Circuit Judges.

OPINION—Decided June 30, 1955.

FAHY, Circuit Judge: The District Court dismissed a complaint filed therein by I.G. Chemie[1] against the Attor-

[1] We use this designation of Chemie for brevity in referring to the plaintiff in the District Court, the appellant in this court. The fuller name of the party is Societe Internationale Pour Participations Industrielles et Commerciales S.A. and Internationale Industrie- & Handelsbeteiligungen A.G. The plaintiff is also known as "Interhandel".

ney General of the United States, as successor to the Alien Property Custodian, and the Treasurer of the United States.[2] The complaint was filed October 21, 1948, under the provisions of Section 9(a) of the Trading with the Enemy Act, 40 Stat. 411, 419, as amended, 50 U.S.C.A. App. Sec. 9(a), to recover properties allegedly valued at more than $100,000,000 which the Custodian had vested, under Section 5(b) of the Act and regulations thereunder, as the property of foreign nationals or of German [for 2029] ests.[3] The property vested is over 90% of the stock of General Aniline & Film Corporation, of Delaware, and some $1,800,000 in various bank accounts and securities. I.G. Chemie itself is a Swiss holding corporation having its domicile at Basle, Switzerland. It claims ownership of the vested stock of General Aniline & Film Corporation and of the cash. It asserts that it is not an enemy within the meaning of the Act and, accordingly, availed itself first of the statutory procedure for seeking return of the property by filing an administrative claim with the Custodian. See Section 9(a) of the Act. Upon denial of its administrative claim Chemie, as also authorized by Section 9(a), sued in the District Court for recovery of the property. The Custodian in his answer denied the property was owned by Chemie and also denied Chemie's allegations that it was not an enemy within the meaning of the Act. The pleadings came to issue on these conflicting claims of ownership and enemy character.

On July 5, 1949, with the pleadings in the situation outlined, the District Court, Chief Judge Laws sitting, on cross-motions, ordered both Chemie and the Custodian to produce for inspection certain documents.[4] Among those

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[2] See Executive Order No. 9788, October 14, 1946, 11 Fed. Reg. 11981. The Attorney General and Treasurer are referred to for simplicity as the Custodian.

[3] See, *e.g.*, Vesting Order of February 16, 1942, 7 Fed. Reg. 1046; Vesting Order No. 5 of April 24, 1942, 7 Fed. Reg. 3148; Vesting Order 907, of February 15, 1943, 8 Fed. Reg. 2453.

[4] See opinion of Chief Judge Laws of June 23, 1949, *Societe Internationale Pour Par., Etc.* v. *Clark*, 9 F.R.D. 263, 13 Fed. Rules Serv. Section 34.11, Case 1 (D.C. D.C.).

ordered to be produced by Chemie were records of H. Sturzenegger & Cie., a Swiss banking concern domiciled, like Chemie, in Basle. Before their production, however, constructive possession of these documents was taken by the Swiss Federal Attorney on June 21, 1950, by his order of June 15, 1950, or, as is sometimes referred to in the proceedings, he seized or confiscated them. His order recited that their production would constitute the fact of prohibited economic espionage under Article 273 of the Swiss Penal Code and would also violate bank secrecy under Article 47 of the Swiss Bank Law "which offense the Federal Authorities have to prevent in order to maintain the public security and order on the basis of their preventive police power". Chemie thereupon, June 22, 1950, moved in the District Court to be relieved of that portion of the order of July 5, 1949, which required it to produce the Sturzenegger records for inspection by the Custodian, stating, as counsel were informed by cable of June 21, 1950, that Sturzenegger & Cie. had been prohibited by order of the Swiss Federal Attorney from delivering its records for such inspection.

On October 31, 1950, the Custodian moved to dismiss the complaint under Rule 37(b)(2), Fed. R. Civ. P., for failure of Chemie to produce the Sturzenegger papers. [4] The Custodian also filed a motion for such relief as should be deemed just and appropriate, including a ruling that all matters which defendants could possibly show by the papers be taken as proven. This motion stated that because of the seizure the court's order of July 5, 1949, would not be complied with by Chemie in Switzerland, and intimated the seizure was procured, and could be undone, by Chemie.

With the matter unresolved the court by order of March 1, 1951, ordered William J. Hughes, Jr., Esq., as Special Master to hold proceedings and take evidence as to the good faith of Chemie in its efforts to comply with the production order of July 5, 1949, and directed him to report [fol. 2030] his findings and conclusions to the court for

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[4] See opinion of Chief Judge Laws, *Societe Internationale, Etc.* v. *McGrath*, 11 F.R.D. 294 (D.C. D.C.).

consideration in connection with Chemie's motion, filed November 28, 1950, for reconsideration of its motion of June 22, 1950, to be relieved of producing the papers. On December 4, 1951, the Special Master filed his opinion, and on July 9, 1952, filed his findings of fact and conclusions, which on Chemie's motion were adopted by the court March 31, 1953. The Special Master found no evidence of collusion between Chemie and the Swiss Government in the matter of the seizure. He made a detailed report favorable to Chemie's conduct in the matter, including its good faith. The District Court said of this report:

> " * * * The report is well-considered and there is substantial evidence to support the findings. While it may be true plaintiff did not exercise the utmost diligence and persistence in seeking to rescind the seizure order of the Swiss Federal Attorney in respect of the Sturzenegger papers, the court finds plaintiff's efforts were those of a reasonable and prudent person in face of the obstacles confronting it. The court will overrule the Government's exceptions and adopt the Master's findings that the order of th Swiss Federal Attorney, dated June 15, 1950, confiscating the records, books, and files of the firm of H. Sturzenegger & Cie. is legally supportable under Swiss law, and that plaintiff demonstrated good faith in its efforts to secure production of the papers of H. Sturzenegger & Cie., as ordered by this court on July 5, 1949."

Societe Internationale, Etc. v. McGranery, 111 F. Supp. 435, 440 (D.C. D.C.).

The court also said, however, that the Special Master's report did not resolve the issue either of Chemie's motion to be relieved of production or of the Custodian's motion to dismiss Chemie's complaint.

Some additional facts should be adverted to before coming more closely to grips with the court's ultimate dismissal of the complaint. After the court ordered the Sturzenegger records to be produced Chemie made unsuccessful efforts to obtain their release by the Swiss authorities. Chemie and the Sturzenegger Bank also sent letters to some of the

latter's customers seeking waivers of their secrecy rights in the records. The court by various orders extended the time for compliance into the month of October, 1953. During the intervening period waivers were obtained from a substantial number of persons and over 9,000 documents[6] [fol. 2031] were cleared by the Swiss Federal Attorney. The process of obtaining waivers continued until some 63,000 documents were cleared and released for inspection and were tendered[7] to the Custodian for that purpose on October 15, 1953. In an affidavit filed a few days later Chemie's counsel stated that of the 124 waivers and consents he had solicited, 91 consents had been received, though 17 of them did not appear primarily to involve Sturzenegger papers. A few persons had refused to waive, a few others were dead or did not respond, or were liquidated corporations whose successors could not be located. As to 3 there was evidence that there were no papers pertaining to them. No account books of H. Sturzenegger & Cie. were then tendered although Chemie advised the Custodian of a plan to be submitted to the Swiss government for photostating parts of books the entire contents of which were not cleared, with the matter declared secret blacked out.

By October 20, 1953, Chemie was unable to assure the court that full compliance would be made even if more time were granted. The court thereupon, in a memorandum dated November 16, 1953, stated its opinion that it was unlikely Chemie could make full production, as had been

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[6] This figure is taken from an affidavit filed in the District Court July 14, 1953, by one of the Swiss counsel for plaintiff, in support of an annexed motion for further extension of time. In the affidavit counsel stated that at the time of his departure from Switzerland in July 1953, the Swiss Federal Attorney "had cleared over 9,000 documents, subject, however, to their being photostated."

[7] The tender was in the form of a letter to the Custodian inviting him to "begin the inspection of Sturzenegger documents" at the offices of plaintiff's counsel in Washington, D.C. The Custodian refused the offer on the grounds that the documents proffered constituted only a part of those ordered produced by the court's order of July, 1949, and that such selective and partial compliance would be rejected. It is not clear from the record what percentage of the papers ordered produced by the July, 1949, order was represented by the 63,000 documents tendered.

required by the Swiss government itself in its own earlier investigations of Chemie's ownership. By order of December 21, 1953, the court (a) granted Chemie's motion of the previous July 14th to extend to September 15, 1953, the time for production, (b) denied Chemie's motion of October 15, 1953, to vacate in part the order of March 31, 1953, and to extend further the time for production, and (c) dismissed the complaint, with prejudice. This last action is the ultimate subject of our review on this appeal.

Chemie's appeal from the dismissal of its complaint leaves unaffected certain counterclaims filed by the Custodian and certain claims of intervening minority stockholders of Chemie to interests in the vested property. [fol. 2032] See Rule 54(b), *Kaufman v. Societe Internationale*, 343 U.S. 156, and *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. McGrath (McGranery)*, 17 Fed. Rules Serv. §24a.2, Case 3 (D.C. D.C.).[8]

The District Court based its dismissal of the complaint on two separate but related grounds, of which Rule 37(b)(2)[9] is more elaborately analyzed by the parties in this

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[8] The order of December 21, 1953, dismissing the complaint, with prejudice, expressly states that it "shall not apply to the claims of intervenors Kaufman, Attenhofer, and Klingler or to the claims of any other stockholders hereafter properly admitted as intervenors in this case."

In *Kaufman*, decided April 7, 1952, the Supreme Court reversed this court's decision, 88 U.S. App. D.C. 296, 188 F.2d 1017, and held that the petitioners, who claimed to be non-enemy minority shareholders in Interhandel, were entitled to intervene as of right under Rule 24(a)(2) in the corporation's suit to recover its seized assets from the Custodian.

Subsequently, on October 23, 1952, the District Court, Pine, J., granted Attenhofer's motion for leave to intervene, which motion Kaufman had opposed. The Master's opinion on the motion had referred to the Attenhofer group as "a management-sponsored group—some of the management are members of it". See 17 Fed. Rules Serv. §24a.2, Case 3, p. 396.

[9] The District Court, pointed out, 111 F.Supp. at 446, that this rule had its parentage in Article [Section] 15 of the Judiciary Act of September 24, 1789, 1 Stat. 82, 28 U.S.C. §636 (1946), repealed by the Judicial Code of 1948, 62 Stat. 869, 992.

court.[10] The court read this Rule in conjunction with Rule 34,[11] which provides that the court on motion may order [fol. 2033] any party to produce and permit inspection and copying or photographing of any designated documents, papers, books, accounts, etc., not privileged, "which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control * * *." It is clear the papers here in question are within the scope of examination permitted by Rule 26(b), that is, that they are not privileged and are relevant to the subject matter of the action. These criteria are again referred to in this opinion.

Rule 37(b)(2), which deals with the consequences of failure to comply with a Rule 34 order to produce, pro-

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[10] The court also, in its order of December 21, 1953, made an express determination, pursuant to Rule 54(b), Fed. R. Civ. P., that there was "no just reason for delay in entering final judgment dismissing plaintiff's complaint". This Rule authorizes the court to enter a final judgment on one or more but less than all of the multiple claims in an action only upon making such a determination and an express direction for the entry of judgment. See *David* v. *District of Columbia*, 88 U.S. App. D.C. 92, 187 F.2d 204.

[11] "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just." Rule 34, Fed. R. Civ. P.

vides that the court may "make such orders in regard to the refusal as are just, and among others the following:"

"* * * (iii) An order * * * dismissing the action * * *."[12]

In addition, Rule 41(b), Fed. R. Civ. P., provides that

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

In determining whether a dismissal is just under Rule 37 for non-compliance with an order to produce under Rule 34, the provisions of Rule 37 dealing specially with that problem, not Rule 41, should govern. No contrary view was expressed by the court below. Nevertheless, Rule 41 does add its influence in any consideration of the power of the District Court to dismiss a complaint otherwise than by reason of Rule 37.

Confining the discussion for the time being to Rule 37, read with Rule 34, we accept the express conclusions of Chief Judge Laws, unless a different finding is required by the action of the Swiss government, that the papers of H. Sturzenegger & Cie., are in the possession, custody or control of Chemie, see 111 F. Supp. at 442, and the basic finding implicit in his opinion that they are also within the scope of examination permitted by Rule 26(b) and not privileged.[13] Chemie vigorously contests the conclusions of the District Court as to possession, custody or control; but we accept them. They are set forth clearly and with sufficient fullness in the opinion of Chief Judge Laws of February 19, 1953, 111 F. Supp. 435, in view of which it seems unnecessary for us to elaborate again the factual [fol. 2034] details. We will, however, discuss the effect of

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[12] Subparagraph (iii) reads in full as follows:

"(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;"

[13] No contention is made in this court that they are privileged.

the laws and actions of Switzerland on these subjects. Before doing so we point out that the narration in Chief Judge Laws' opinion of the relation of Hans Sturzenegger to I. G. Chemie, his dominant position with respect to H. Sturzenegger & Cie., which is the successor to Ed. Greutert & Cie., the relation of the three companies to one another and to other companies, including, on information now available, I. G. Farben and other German interests, cannot be said by us to be erroneous. After thorough acquaintance with the case in its various stages over a period of years Chief Judge Laws said he "definitely concludes that the Sturzenegger papers were and are in the possession, custody or control of plaintiff and that except for their confiscation by the Swiss Federal Attorney, plaintiff would be able to produce them." 111 F. Supp. at 442. This finding rests upon a discussion of the evidence which traces the history of the close connection between I. G. Chemie and H. Sturzenegger & Cie. For any purpose relevant to Rules 34 and 37 the findings are sufficient in form and definiteness; and, for purposes of our favorable review, find adequate support in the record. We accept also the further finding and conclusion of the District Court that the Sturzenegger papers are relevant to the issues raised by the complaint of Chemie. We do not understand Chemie to urge the contrary. A number of grounds are set forth in the opinion of the court, 111 F. Supp. at 442, as representing the Government's position with respect to relevancy, followed by the court's recognition that "banking records of the transactions of a corporation are among the best possible indicia of its ownership and control". The court there also said:

> "The records of H. Sturzenegger & Cie. are conceded by plaintiff to be relevant to the issues. Counsel for plaintiff avers he is even more interested and concerned than are defendants in their production, that they are important to him in the presentation of his proof and to meet and refute the allegations of German interest and control made by the Government."

As we have indicated, the papers in question are relevant, are not privileged, and, except for the laws and actions of

the Swiss government, are in Chemie's possession, custody or control for the purposes of Rule 34. It does not follow, however, that Chemie's failure to produce them necessarily requires dismissal of its complaint with prejudice, under Rule 37(b)(2)(iii). We consider first, however, whether the action of the Swiss government, and Chemie's good faith, bar such dismissal.

As previously set forth, the Swiss Federal Attorney's order of June 15, 1950, recited that production of the papers would constitute the fact of prohibited economic espionage under Article 273 of the Swiss Penal Code and would also violate bank secrecy under Article 47 of the Swiss Bank Law, "which offense the Federal Authorities have to prevent in order to maintain the public security and order on the basis of their preventive police power". Pursuant to the order he constructively took possession of the papers, or, as we have also said, he seized or confiscated them. Chemie contends that this removed the papers from its "control" within the meaning of Rule 34, even if otherwise they were within such control. This contention no doubt centers upon "control", rather than "possession" or "custody", because physically the papers remained in the possession or custody of Chemie, though subject to the control exercised by the Federal Attorney. Since his constructive seizure of the records was subsequent to the District Court's order requiring their production, his action bears upon the validity of the dismissal rather than upon the validity of the District Court's order when made.

[fol. 2035] Rule 37(b)(2), as we have seen, provides that when a party refuses to obey an order to produce under Rule 34 the court may make such order as is just, including one dismissing the action. See subparagraph (iii). Did Chemie refuse to obey? Or, on the contrary, has it merely been unable to obey? If the latter, does its inability, though involuntary, nevertheless constitute a refusal under the Rule? The District Court thought it did. Pointing out that Chemie had the Sturzenegger papers in its actual possession but declined to exhibit them as ordered, the court said,

> "* * * That plaintiff may have had good reason for its refusal would make the act nonetheless a refusal." (111 F. Supp. at 446)

The court then referred to the Advisory Committee Note of 1937 to Rule 37, to the effect that the provisions of the Rule authorizing judgment of dismissal for refusal to make discovery accords with *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, which, the Note continues, distinguishes between the justifiable use of such a measure to compel production of evidence and its unjustifiable use as punishment for contempt, condemned in *Hovey* v. *Elliott*, 167 U.S. 409. *Hammond Packing Co.* v. *Arkansas* involved a refusal to produce which the Court termed a "failure by the defendant to produce what we must assume was material evidence in its possession" and which defendant had the power to produce. It followed, the [13] Supreme Court said, that the entry of a default judgment against defendant found its sanction,

> " * * * in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause." (212 U.S. at 350-1)

[fol. 2036] In the case at bar our concurrence in the District Court's adoption of the Special Master's report precludes consideration of whether Chemie's efforts to secure the documents were in bad faith, or of whether Chemie could have produced them without violating the Swiss secrecy laws. *Hammond Packing Co.* v. *Arkansas* accordingly seems inapplicable.

Nevertheless, we think it unnecessary to decide whether Chemie's "failure" to produce in the circumstances was such a "refusal" within the meaning of Rule 37 as warranted dismissal of its complaint with prejudice. For it is not a condition to the exercise of the power to dismiss that Chemie's inability to produce be construed as a "refusal". Specification in the Rule of remedial action available to a District Court upon a party's refusal to obey a Rule 34 order does not exhaust the court's powers. This is especially so where the action of a foreign sovereign, though a friendly one, has given rise to the problem, creating a situation hardly contemplated by the framers of Rule 37. Yet we cannot think they intended that a District Court would be powerless to

solve the problem in a just manner, consistently with due process of law. We agree with Chief Judge Laws that the power to dismiss is not dependent upon the terms of Rule 37; that is to say, we think it unnecessary to find a refusal within the meaning of that Rule. As he said:

> "* * * apart from dismissal by authority of specific rule of court or statute, a court has inherent power to dismiss a suit, stay a trial or impose other limitations on the right to proceed with trial when it is established a party plaintiff has failed to comply with order of the court issued pursuant to its rules. See Refior v. Lansing Drop Forge Co., 6 Cir., 1942, 124 F. 2d 440, certiorari denied 1942, 316 U.S. 671, 62 S.Ct. 1047, 86 L.Ed. 1746; Note, 4 A.L.R. 2d 348. If this were not so, a court would be powerless to enforce its rules and a litigant might ignore them with abandon. * * *" (111 F. Supp. at 447)

Rule 37 apart, Rule 41(b) would permit dismissal for "failure" of the plaintiff to comply with an order of the court, thus reflecting the power thought by the Rule framers to reside in the court aside from the specific confines of Rule 37.

In the end the question turns upon whether the particular exercise of the power to dismiss with prejudice is consistent with due process of law. We advert now to factors which lead us to conclude that the power as exercised in the present case meets this constitutional test. The property of Chemie, a corporate national of Switzerland, had been vested under the Trading with the Enemy Act. See *Kaufman* v. *Societe Internationale*, 343 U.S. 156, 159. There, in referring to *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, the Court said:

> "* * * We there held that the 1941 amendment [to the Trading with the Enemy Act] authorized the Custodian to seize and vest in himself all property of any foreign country or national, even that of friendly or neutral nations. At the same time we refused to hold that the 1941 amendment deprived friendly or neutral nations or nationals of a right to have their assets re-

turned if they could prove that they were free of any open or concealed enemy taint. * * *"

These cases demonstrate that Congress intended by Section 9(a) of the Act to permit any corporation of a neutral or friendly state to recover property vested under Section 5(b) if "not an enemy or ally of enemy" or, as said in *Kaufman* v. *Societe Internationale, supra* at 159, "if they could prove [fol. 2037] that they were free of any open or concealed enemy taint." Chemie having filed its action under Section 9(a) to recover property vested under Section 5(b) the principal issue on the merits is whether it was enemy tainted within the principles of *Clark* v. *Uebersee Finanz-Korp., supra*. As we have set forth and as is more fully detailed in the opinion of Chief Judge Laws, the Sturzenegger papers are material on this issue. They were ordered produced. If the Swiss authorities had not then intervened, and if Chemie had wilfully refused to comply with the order, dismissal of its complaint with prejudice, based on such refusal, would not have been an unconstitutional deprivation of property, *Hammond Packing Co.* v. *Arkansas, supra* at 351. Except for the action of the Swiss Federal Attorney, explicitly designed to prevent their production in this case,[14] the documents could have been produced. For the District Court to hear and decide the case without them might give plaintiff a decisive advantage, leading to recovery of extremely valuable property notwithstanding; were the papers produced, Chemie might be shown to be enemy tainted, in [16] which case the property would be withheld by the

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[14] This is illustrated by an order of the Swiss Federal Attorney of June 25, 1951, denying Chemie's request to countermand the seizure order and permit Sturzenegger to produce its books and records. In denying the request, the Swiss authority stated: "The said order [seizing constructively the books and records] applies exclusively to the firm Sturzenegger & Co. * * * and against the order of the American court in respect of this banking firm for the production of its business records to the United States District Court * * *." "The fact that the American authorities wish to inspect the records * * * is exactly what gave rise at that time to the issue of the order * * *." The order itself had expressly described the documents thereby confiscated as "the business records or books of the banking firm * * * ordered to be produced by the American judge".

United States under existing legislation. True, there is no certainty about this. Uncertainty as to the part the undisclosed papers would play creates the difficulty. But, in view of the findings of the District Court, we think due process of law does not require the Custodian to sustain with certainty prior to trial the proposition that the undisclosed papers would defeat Chemie, or the proposition that Chemie's claim can be defeated without them. Where, as here, adequate basis underlies the District Court's findings of relevancy and materiality, and of possession, custody or control, except for the Swiss Federal Attorney's order, so that the indicated relationship between Chemie and H. Sturzenegger & Cie, leads reasonably to the conclusion that the records are important in resolving the issue of Chemie's enemy taint, due process of law is not violated by requiring their production as a condition to trial. In other words it is not fundamentally unfair or arbitrary to require Chemie to comply with an order that is designed, in accepted legal fashion, to elicit the truth or, failing compliance, t dismiss its action, when the requirement is shown to have a very real relationship to the means of arriving at the truth of the substantive issues in the litigation.

Due process in the circumstances of the case does not insist that Chemie be allowed to go to trial in a manner inconsistent with accepted procedures, now embodied in the Rules but which long antedate them in development. Handicap in the conduct, and risk in the outcome, of litigation, due to the absence of evidence reasonably determined on the basis of available information to be relevant and material, need not be cast upon a defendant when a plaintiff by action of its own government is disabled from complying with discovery rules applicable generally to litigants under the law of the forum. Switzerland in her own wisdom, upon consideration no doubt of many factors, has rendered her national, Chemie, unable to comply with a valid order of the trial court in an important matter respecting the evidence. The order itself is not inconsistent with due process of law. [fol. 2038] *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541. To require compliance as a condition to Chemie's further prosecution of its claim is to insist that if the trial is to go forward it shall do so in accordance with accepted

procedures for developing the truth about contested factual issues raised by Chemie, the ultimate objective of the trial. This too is not a denial of due process of law, since, to borrow the test applied to legislation, "the means selected * * * have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York*, 291 U.S. 502, 525, 537.[15] *Lapides* v. *Clark*, 85 U.S. App.D.C. 101, 102, 176 F.2d 619, 620, *cert. denied*, 338 U.S. 860. See, also, *Minder* v. *Georgia*, 183 U.S. 559, 562; *Davidson* v. *New Orleans*, 96 U.S. 97, 107-8, separate opinion of Mr. Justice Bradley; *Missouri Pacific Railway Co.* v. *Humes*, 115 U.S. 512, 519, 520; *Ballard* v. *Hunter*, 204 U.S. 241, 255; *Endicott Co.* v. *Encyclopedia Press*, 266 U.S. 285, 288; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584-5; *Carolene Products Co.* v. *United States*, 323 U.S. 18, 31-2.

It will be seen from the foregoing discussion that our view, like that of the court below, does not lean heavily upon the theory of a factual presumption adverse to the one who fails to produce the papers ordered, as in *Hammond Packing Co.* v. *Arkansas*, *supra*, nor upon the theory of punishment, discredited in *Hovey* v. *Elliott*, *supra*. Though there may be some element of adverse factual presumption, we rely chiefly on the necessity for discovery as an aid in the development of facts. This is particularly important in such a case as this, where the intricacies of relationships are so difficult to unfold and their geographical locale is centered so close to the former enemy, and where the secrecy laws which Switzerland deems wise prevent discovery which on adequate showing is deemed material to the case.

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[15] In *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701, 708, the Supreme Court said:

"* * * It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause * * * means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. * * *"

What we have here said is fortified by established legal principles. It is settled that "the fullest possible knowledge of the issues and facts before trial" is intended by the rules governing discovery. *Hickman* v. *Taylor*, 329 U.S. 495, 501. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Ibid.*, p. 507. In *Dixon* v. *Ramsey*, 7 U.S. (3 Cr.) 319, 324, involving the authority of an executor appointed in a foreign country to sue in the courts of this country, Chief Justice Marshall said: "No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country." "[S]ubstantive matters are governed by the foreign law, and * * * procedural matters, or, as it is more usually expressed, matters relating to the remedy are governed by the law of the forum." 3 Beale, Conflict of Laws (1935) 1600. *Don* v. *Lippman*, 5 Cl. & Fin. 1, 7 Eng. Rep. 303, 307 (H.L. 1837). In a footnote to the opinion of the Court in *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, at 134, it is said that a foreign sovereign suing as a plaintiff must give discovery, citing *Rothschild* v. *Queen of Portugal*, 3 Y. & C. Ex. 594, 596; *United States* v. *Wagner*, L. R. 2 Ch. App. 582, 592, 595; *Prioleau* v. *United States*, L. R. 2 Eq. 659. See, also, *King of Spain* v. *Hullett*, 7 Bligh N.S. 359, 392-3 (H.L. 1833). A foreign national is in no better position.

[fol. 2039] The *Prize Cases*, now to be considered, are also enlightening as to the force which the courts have recognized as residing in rules or court orders requiring discovery. Discovery has been insisted upon notwithstanding it was forbidden by the law of the sovereign of the claimant; and failure on his part to make discovery has at times resulted in dismissal of his claim.

In *The Consul Corfitzon* [1917] App. Cas. 550, Swedish claimants to cargo seized on the high seas appealed from an order of the Admiralty Division requiring them to produce certain books of account and other documents. They had declined on the grounds they might become liable to penalties under Swedish law. In affirming the discovery order the Privy Council stated that "a Court of Prize cannot properly be deterred from making * * * the appropriate order because a neutral claimant would,

duced. I don't see how the plaintiff is going to be able to comply with that order so long as the Government of Switzerland continues its confiscation of the papers.

"Now, under the laws of the United States, there is no provision whatever for a neutral to decide what papers are relevant or what are not, in reference to this case, and under the applicable rules of the United States courts, there is no requirement that any party to a case should be forced to proceed by way of letters rogatory to obtain documents in custody of one of the parties. I think it very well may be unfortunate that the plaintiff must be deprived of its trial by reason of the laws of another nation and the acts of its representatives. I must confess I have quite a little sympathy for counsel for plaintiff, because I know that counsel have worked extremely hard to comply with the order, and I have made a formal finding that they acted in good faith, including the plaintiff. But the procedural laws of the United States, as well as the substantive laws, may not be relaxed upon its courts because of difficulties a party may have with a different sovereign power.

"In my view, nothing short of a complete release of the papers by the Government of Switzerland, leaving this court or its representative in a position to decide what is relevant or what is to be produced, will comply with our laws. I simply don't see how I would have any right whatever to permit a neutral to come in there to take the place of this court or its special master. If I did that, I think that would write something new into the rules of the court; and that is as far as we have gotten, at the end of now seven years."

No more need be said. Plaintiff's American assets were seized in the United States as enemy owner property and [fol. 2056] title, pursuant to law, was vested in the Alien Property Custodian and his successor, the Attorney General. Plaintiff sought recovery of the vested assets on the premise that it is not and was not an enemy or an ally of an enemy. In the course of the ascertainment of

the plaintiff's right, resort having been had to our courts, the papers in question became relevant. We concluded that they are not privileged, and except for the laws and actions of the Swiss Government, there is no doubt they could and would have been amenable to the discovery which our courts ordered under rules deemed essential and conducive to the proper and orderly administration of justice in a court of the United States. Since we have held that it was not fundamentally unfair or arbitrary to require the plaintiff to comply with an order designed to elicit the truth, or, failing compliance, to dismiss the action, the District Court's orders were within its powers. There is no error.

Affirmed.

[fol. 2057] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,460—April Term, 1957.

C. A. 4360-48

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC., Appellant,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., Appellees.

No. 13,527—April Term, 1957.

C. A. 4360-48

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC., Appellant,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., Appellees.

Appeals from the United States District Court
for the District of Columbia.

Before: Wilbur K. Miller, Fahy and Danaher, Circuit Judges.

JUDGMENT—April 11, 1957

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the orders of the said District Court appealed from in these cases be, and they are hereby, affirmed.

Dated: April 11, 1957.

Per Curiam.

[fol. 2058] IN THE UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13460 and 13527

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC., Appellant,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., Appellees.

PETITION OF APPELLANT FOR REHEARING EN BANC—
April 26, 1957

Appellant hereby petitions this Court for a rehearing *en banc* in respect of the opinion of this Court of April 11, 1957 (Circuit Judges Wilbur K. Miller, Fahy and Danaher).

In its opinion, this Court affirmed orders of the District Court (1) dismissing appellant's complaint with prejudice

for appellant's involuntary inability to comply with a discovery order, and (2) refusing to extend the time fixed in [fol. 2059] this Court's opinion of June 30, 1955.[1] In so ruling, the District Court had refused to consider appellant's plea that if had substantially complied with the discovery order, and also had turned down appellant's suggestion of an impartial investigation to bring to light missing papers—if any—as a basis for further efforts to identify them or to effectuate their release.

I. Dismissal of Appellant's Complaint Before Trial Without Any Fault on Its Part Is a Denial of Justice.

The rulings below, as affirmed in the opinion of April 11, in effect denied appellant access to the Courts of the United States to recover valuable property of which appellant was wrongfully deprived by administrative *fiat*.[2] Such a denial of justice is the most severe penalty a court can impose on a civil litigant. In the absence of a showing of bad faith on the part of appellant, and in the absence of any concrete indication that trial of the case would prejudice appellees' rights, a court having jurisdiction over parties and subject matter can not refuse to hear issues of law and of fact on their merits without violating the express provisions of the Federal Constitution. Fifth Amendment to the Federal Constitution; *Hammond Packing Co. v. Arkansas*, 212 U.S. 322; *Hovey*

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[1] 96 U.S. App. D.C. 232, 225 F. (2d) 532.

[2] Appellant's property was confiscated in 1942 under the broad vesting powers of the Trading with the Enemy Act, 50 U.S.C. App. §5(b), which only required an administrative determination that the property was owned by *foreign nationals*—not enemies. No hearing was had at that time. Nor was any hearing held in 1947, when appellant's request for return of its property pursuant to the same Trading with the Enemy Act was turned down, and no reason for such refusal was given except an administrative *ex parte* statement that it would not be "in the national interest" to comply with appellant's request. Now and at all times appellant is ready to prove affirmatively that it is entitled to a return of its property under the Trading with the Enemy Act, and the rules of international law. Appellees, on the other hand, have consistently avoided the submission of their case to scrutiny by a judicial or administrative tribunal, in this country or abroad.

[fol. 2060] v. *Elliott*, 167 U.S. 409; *McVeigh* v. *United States*, 11 Wall. 259; *Duell* v. *Duell*, 85 U.S. App. D.C. 78, 178 F(2d) 683.

In the case at bar, no doubt exists as to appellant's good faith. Nor can it be said that unless appellant's complaint is dismissed *before trial* appellees' rights will be prejudiced, or are even reasonably likely to be prejudiced in fact or in law.[3]

In the light of these facts, it is submitted that this Court's ruling runs counter to the foregoing decisions. The problem is no longer one of interpreting the Federal Rules of Civil Procedure as to discovery and power to dismiss. This case turns on a fundamental question of constitutional law. It is for this reason that appellant now urges this Court to reconsider in a rehearing *en banc* the important legal issues presented.

II. This Court Failed to Take into Consideration Appellant's Claim That It Has Substantially Complied With the Discovery Order.

In its opinion of April 11, this Court *assumed* that appellant had not complied with the trial court's discovery order. Appellant had complained of the District Court's failure to investigate this question, and this became an important point for consideration by this Court.

Appellant has obtained and tendered to appellees over 200,000 records of the Sturzenegger Bank. J.A. 15. It claims and has claimed below that this constitutes substantial compliance with the discovery order. In support [fol. 2061] of its plea of substantial compliance, appellant tendered the 200,000 records for inspection by appellees.

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[3] Appellees' contention of injury is pure speculation. They have contended that they needed discovery of certain unidentified papers to prepare their defense. There has been no showing that substantial discovery was not already made, or that there are any other documents in existence which would facilitate appellees' defense. Indeed, appellant is willing to participate in a procedure which will bring to light and identify any other document, wherever located, relevant to the issues at bar, assuming that any additional relevant documents exist outside the hundreds of thousands already tendered for discovery.

J.A. 15. Although defects inherent in the discovery order make it impossible to know which of the Sturzenegger records had to be produced, appellant sincerely believes that this much greater number of documents now tendered contains all the records it was ordered to produce.

Appellees deny that the records tendered to them constitute substantial compliance because they are not represented as constituting *all* the bank's records. However, no evidence has ever been produced to support their contention, and appellant was not required to produce *all* the bank's records. Indeed, appellees have refused even to look at the papers offered to them. How can it be seriously maintained, then, that appellant failed to comply with the discovery order, and should thus be denied a trial on the merits?

Whether or not appellant did in fact comply with the discovery order has become the pivotal question on which hinges the return of its confiscated property. Appellant's claim that it has substantially complied should have been investigated by the lower court. Simple justice required a hearing before this particular issue could be determined adversely to appellant. The trial court refused to consider appellant's claim. It did not even look or ask appellees to look at the mass of papers obtained by appellant at great cost and effort. It assumed, without considering any of the facts available, that discovery had not been made. This, we submit, was fundamental error below, and this Court apparently omitted to pass upon the point.

[fol. 2062] III. This Court Erred in Refusing Appellant's Request for an Impartial Investigation and Further Efforts to Supplement Discovery.

Appellant suggested that, since neither it nor appellees had access to the Sturzenegger files, an impartial investigator be appointed to examine these files in Switzerland and to report on the possible existence and identity of additional relevant documents, if any such documents existed. Further efforts could then be made to obtain them. J.A. 28-32.

This Court proceeded on the assumption that the auxiliary discovery plan outlined above could not replace phys-

ical discovery of the Sturzenegger documents as ordered, and that therefore appellant's complaint had to be dismissed. This reasoning, appellant submits, is defective for the following reasons:

The additional discovery plan was never intended as a substitute for discovery as ordered by the trial court, but merely as an auxiliary check made necessary by faulty designation and identification in the discovery order of the records to be produced. Appellant might have stopped once it had obtained many times the required number of documents. Such discovery, pertaining to the issues at bar, was indeed substantial compliance with the trial court's order. If appellant has gone further by suggesting a supplementary investigation, it did so not as an admission of weakness, but because it wishes to be certain that all *relevant* Sturzenegger records, whether or not they are covered by the discovery order, will be available to the parties for trial.

This Court did not, and indeed could not, deny that appellant's auxiliary discovery plan would *in fact* have brought to light all remaining relevant evidence, if any exists beyond the records already tendered. Even if by unlikely hypothesis[1] certain records could not be produced, [fol. 2063] their nature and identity would be unequivocally disclosed.[2] This, in turn, would have permitted the lower court to determine *at trial* and in concrete instances whether the established absence of a name on a given document—nothing ~~else could~~ possibly be withheld—was crucial and should be resolved by an inference against appellant.

By discarding the auxiliary discovery plan—which, if nothing else, would have served the purpose of testing appellees' speculative contention that they would be prejudiced by the absence of some records—the Court deprived appellant of its right of action upon the ground of its inability to produce records which may well turn out not to exist, or to be irrelevant.

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[1] Not one concrete or even likely instance was cited where a relevant Sturzenegger document would be unavailable.

[2] Admittedly, the only information the bank might be compelled to withhold are the names of customers who have not waived their secrecy rights.

The Federal Rules of Civil Procedure do not give parties an absolute right to all physical evidence before trial, particularly where, as here, it is not in fact available to their opponents. They provide for a mutual exchange of information, *Hickman v. Taylor*, 329 U.S. 495, mitigated by many exceptions and by the provisions of Rule 30(b) which states that discovery shall be ordered only in such a manner as not to cause harassment and oppression. Rule 30(b) Fed. R. Civ. P.

The auxiliary discovery plan was certain to bring to light all the information to which the parties were entitled. Its use of an independent investigator followed a pattern well known and recognized in American practice. *Service Liquor Distributors, Inc. v. Calvert Distillers Corporation*, D.C. S.D. N.Y. 1955, 16 F.R.D. 513. How then could appellees' claim that they would be deprived of an established right? The auxiliary discovery plan is designed to give them all the information they could desire. Surely, it cannot be held that the vague possibility that unidentified information might not be available—through no fault of the [fol. 2064] parties—would require that the case be thrown out of court! The way to handle such an unlikely eventuality is by raising presumptions or inferences against the party having the burden of proof. The time to do so is at trial, when the issues are joined and when the absence of specific evidence acquires a concrete significance.

IV. Conclusion.

For these reasons, it is urged that this Court reconsider *en banc* the serious issues presented in this case. The previous rulings have had the effect of reviving a sporting theory of justice by making it possible for appellees to jockey appellant into a position where it cannot obtain relief from the courts against confiscatory actions of the Government. It is submitted that appellant's predicament—regretted by this Court in its opinion of April 11—is not due to any desire to evade fullest discovery, nor to inability to make discovery due to Swiss law or to other factors. It is really caused by appellees' persistent refusal to cooperate in obtaining or analyzing the desired information from the Sturzenegger files. Appellant firmly

believes that had appellees inspected the available Sturzenegger records and cooperated in implementing the auxiliary discovery plan, this case could be readily tried on the basis of all *relevant* evidence existing in the Sturzenegger files or elsewhere. The penalty imposed on appellant is not only harsh and contrary to established principles of law; it is also unnecessary.

It is, respectfully submitted that, to avoid a serious denial of justice, the instant motion for a rehearing *en banc* should be granted.

[Vol. 2065] We, Roger J. Whiteford and John J. Wilson, attorneys for appellant, hereby certify that this petition for a rehearing *en banc* is filed in good faith and not for delay.

Roger J. Whiteford, John J. Wilson, Attorneys for Appellant.

April 26, 1957.

I hereby certify that on the 26th day of April, 1957, I caused copies of the foregoing Petition for Rehearing *en banc* to be delivered to the office of Sidney B. Jacoby, Esq., Office of Alien Property, Washington, D. C., one of the Attorneys for the Appellees.

John J. Wilson

[fol. 2066] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Nos. 13,460 and 13,527—April Term, 1957

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC., Appellant,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., Appellees.

Before: Edgerton, Chief Judge, Prettyman, Wilbur K. Miller Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR REHEARING IN BANC—
May 10, 1957

Upon consideration of appellant's petition for a rehearing in banc, and of appellees' answer, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

PER CURIAM.

Circuit Judge Miller would grant the petition for a rehearing in banc.

Circuit Judges Bazelon, Washington and Burger did not participate in the foregoing order.

[fol. 2067] IN THE UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13460 and 13527

SOCIÉTÉ INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC., Appellant,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., Appellees.

DESIGNATION OF RECORD—Filed July 24, 1957

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for a writ of certiorari in the above-entitled consolidated cause, and include the following:

1. Printed Joint Appendix in Appeal No. 12140 (4 volumes)
2. Order of this Court consolidating Appeals Nos. 13460 and 13527, dated September 10, 1956
3. Order of this Court making record in Appeal No. 12140 part of the record in the above-captioned appeals
4. Printed Joint Appendix in the above-entitled appeals
5. Affidavit of Edmund Wehrli, filed February 11, 1957 (with notation of leave to file granted in open court on that date)
6. Affidavit of Peider Konz, filed February 11, 1957 (with notation of leave to file granted in open court on that date)
7. Opinion in above-captioned appeals

[fol. 2068] 8. Judgment in above-captioned appeals

9. Appellant's petition for a rehearing *in banc*
10. Order denying petition
11. This designation

/s/ JOHN J. WILSON, PEDER KONZ, Address: 815—15th Street, N.W., Washington 5, D. C., Attorneys for Appellant.

I hereby certify that on the 22nd day of July, 1957, I have mailed copies of the foregoing Designation of Record to Sidney B. Jacoby, Esq., Office of Alien Property, Washington, D. C., one of the attorneys for appellees.

/s/ JOHN J. WILSON

[fol. 2069] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered from 1 to 1918, both inclusive, constitute a true copy of the joint appendix to the briefs in the following case:

No. 12,140

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC., Appellant,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., Appellees,

and that the foregoing pages numbered from 1919 to 2052, both inclusive, constitute a true copy of the joint appendix to the briefs, and of the records and proceedings, as designated by counsel for appellant in the following cases:

Nos. 13,460, 13,527—April Term, 1957

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC., Appellant,

v.

HERBERT BROWNELL, Attorney General of the United States, as Successor to the Alien Property Custodian, et al., Appellees.

as the same remain upon the files and records of said Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this twenty-fifth day of July, A. D. 1957.

/s/ Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit.

[fol. 2070] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

TRANSCRIPT OF HEARING BEFORE CHIEF JUDGE LAWS—April 1, 1949

Mr. Schwartz: The other issue is as to the scope of the papers we are to have. We say that plaintiff has possession, custody, and control of the papers of Osmon and the papers of H. Sturzenegger A. C. Now, the plaintiff has conceded possession, custody, and control of papers of Osmon, a 100 per cent subsidiary. Then there remains a question, and my brother addressed himself to that almost exclusively, that he does not have possession, custody, and control of the Sturzenegger papers.

First, I think it very significant that he conceded or ignored questions of relevance and good cause. He con-[fol. 2071] ceded that the papers would be relevant. They would bear on the issues in the case——

Mr. Wilson: I said they might.

Mr. Schwartz: Your Honor, may I be spared further interposition?

The Court: Yes. Don't interrupt.

Mr. Schwartz: As to good cause, there is a world of good cause. The issue in this case is enemy taint. The issue in Switzerland, under Swiss law, of I. G. Chemie was of German character—perhaps a much more limited function.

The Court: There isn't any question about that. The only question is——

Mr. Schwartz: Do they have possession, custody, and control?

The Court: That is right.

Mr. Schwartz: We submitted an affidavit in which we quoted and attached records of the Swiss Government which, to our minds, demonstrate that plaintiff has possession, custody, and control of the papers of Sturzenegger.

Then we summarized further material from the transcript showing that plaintiff has possession, custody, and control.

In opposition to that showing, we have two things from the plaintiff. We have a memorandum of his counsel, which has no status as to the facts, and we have a cabled affidavit which is a legal conclusion, if I ever saw one.

[fol. 2072] The affidavit which is to be filed when it comes—and we have no objection to that—says that he does not have possession, custody, and control. Those are the words of the rule. He does not have legal access to those documents. He does not have the right, under the contract of partnership, to those documents.

Now, Your Honor, we have made desperate efforts to get the contract of partnership between plaintiff and Sturzenegger. We subpoenaed Mr. Sturzenegger and Mr. Wilson, and Mr. Wilson individually, at Mr. Wilson's suggestion, because we were doubtful as to where the subpoena would lie. We subpoenaed Mr. Wilson again. He has not brought that contract of partnership between plaintiff and Sturzenegger. If he has it now, he has refused, before we stood up here, to let me see it, so that we could read the German text. So if he produces it now, he produces a German document which we have never seen before.

Now, under that contract, we have some hearsay on it. We have the Swiss Government's hearsay on that contract. The Swiss Government says that I. G. Chemie is a sleeping partner in the firm of H. Sturzenegger. In the middle of the war I. G. Chemie owned almost half of Sturzenegger. The plaintiff corporation owns almost half of a partnership. Later in the war that portion was reduced, and now I. G. Chemie owns 15 per cent of the capital of H. Sturzenegger.

[fol. 2073] So you have a situation where the plaintiff is a partner in a partnership. Now, you can subpoena a partner's records by subpoenaing one partner——

Mr. Wilson: Where is the authority for that?

Mr. Schwartz: Your Honor, you have ruled that I am to have no interpositions.

The Court: Yes. Don't interrupt, Mr. Wilson.

Mr. Schwartz: Your Honor, this is what we get in court. You read the transcript and you will see it multiplied by a thousand times.

The Court: Let us proceed.

Mr. Schwartz: We have plaintiff, who was a partner. We could subpoena a partnership's records by subpoenaing a partner. Your Honor can order this partner to produce those records, and then we will show whether Mr. Germann really does not have physical access to these records. Those records, the affidavits and transcript show, are constantly interchanged.

Your Honor, we have the old situation that we knew in the financial days of the twenties. We have the little holding company, which is the plaintiff, and we have a private bank around the corner, which is Sturzenegger. Sturzenegger controls the plaintiff, and there is no possible interposition about that.

The firm of Sturzenegger, with its own and owning [fol. 2074] companies—they are quite a circle, you know—controls the plaintiff. It owns the largest single block of stock in the plaintiff. So we want the partnership records. Plaintiff is a partner. The partnership owns the plaintiff—and it goes round and round in a circle—and, of course, they have possession, custody, and control of those records.

Industrie Bank, the other partner, Your Honor, is about to come in as a plaintiff in this proceeding. Mr. Wilson has represented, in a memorandum on another motion, that he will cause Industrie Bank to file a complaint. Industrie Bank is the third partner. So we are going to have all the partners in the case, but nobody has possession, custody, and control of the partnership records.

Your Honor, we think that is not so. We think we have shown by our affidavits that they have control.

There is at least one case on that. We found one case, and no case to the contrary, where a corporation was ordered to produce the records of a partnership in which it had an interest.

That, Your Honor, is the question of the Sturzenegger records. There are still other questions, Your Honor, but you may wish to have a counterargument on this issue.

The Court: All right.

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[fol. 2075] TRANSCRIPT OF HEARING BEFORE CHIEF JUDGE LAWS—APRIL 18, 1950

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Mr. Wilson: * * *

[fol. 2076] Now, if the Court please, the third phase of what I wanted to mention to Your Honor in some general prefatory remarks before moving in upon these separate motions themselves, has to do with the very rigid and most seriously considered Swiss Security Laws.

I am aware of the disposition of the courts in this country to regard the question of privilege, or secrecy, as being one to be determined by the law of the forum. And I am aware of Your Honor's disposition with respect to that point in the course of the Obersee trial. And I am aware of the express direction of Judge Bailey in this very case with respect to Mr. Sturzenegger, that he could not avail himself of the Swiss Secrecy Laws in declining to answer questions which were propounded to him in the taking of the deposition.

I don't intend to re-argue that point as it affects the question of the right of an American court to apply the law of the forum in relation to a witness, who here sits before the Court testifying or is physically located within the territorial limits of the United States at the moment when he claims his privilege. I am invoking the Swiss Secrecy Laws for the purpose of having them considered by the Court on the question of the exercise of the Court's discretion with respect to the enforcement or modification of this order with respect to the records of H. Sturzenegger and Company.

I want to say to the Court from my personal knowledge, [fol. 2077] I want to say to the Court from adequate and satisfactory documentation, that the Swiss, despite our own point of view about the situation over here in America, regard with extreme seriousness the inhibitions which are

if he obeyed the order, be guilty of a breach of his own municipal law," *ibid.*, p. 555, adding that the "practice and procedure [of the forum] are governed by the municipal law of the State from which it derives its jurisdiction."

In *Steamship "Attilla" and Other Vessels*, 7 Lloyd's Prize Cases 401, broad discovery orders of the *Consul Corbitson* variety had been made relating to claimants' business books, but had been complied with only partially. Claimants, being unable to promise full compliance, requested permission to try the case on the evidence available. The court denied the request and struck the claims, stating:

> " * * * that when orders are made by this Court, and are not appealed from, they must be taken to be valid orders, and they must be obeyed. If they are not obeyed, those claimants upon whom they are made will be in contempt and their claims will be liable to be struck out. * * * " (*Ibid.*, p. 405)

The Baron Stjernblad [1918] App. Cas. 173, 178, reiterated the Prize Court's policy of refusing "to accept the dictates of any municipal law as to what discovery ought or ought not to be insisted on either generally or in any particular case." The Privy Council recognized the foreign claimant was put in the anomalous position of either losing his case or incurring penalties in his own country, but pointed out that "the anomaly is certainly not due to any defect in the practice of the Prize Court or in the law which it administers." *Ibid.*, p. 179.

There is a reference to *Kronprinsessan Margareta* in 6 Lloyd's Prize Cases 105 n. The Privy Council is said to have denied leave to appeal from the dismissal of a claim when the Swedish claimant declined to answer some of the interrogatories administered to it on the court's authorization because permission to answer had been requested and denied by the Swedish government. It was said this refusal made no difference in the Prize Court.

In *The Kronprinzessin Victoria* [1919] App. Cas. 261, a trial had taken place, at which the claimants declined to produce their books in court because of Swedish laws.

Holding that the court properly refused to let the Swedish secrecy law affect its weighing of the evidence in deciding against claimants the Privy Council pointed out, at p. 267, that "if the evidence by which their case might have been cogently supported was required for their other business in Sweden, it was for them to chose [sic] whether they would conduct their case or their business to the better advantage."

In Re Von Kantzow's Patent [1944] Ch. 318, 321, was a non-prize case where applicants sought extension of certain British patent rights in order to recoup revenue losses allegedly suffered during the war. Due to Swedish secrecy [fol. 2040] laws they were unable to furnish evidence that they had not made countervailing profits abroad during the war. Consistently with the prize-case principle of maintaining discovery orders over contrary foreign law, the court said:

> "* * * It appears to me that this court, having placed on it the delicate task of determining whether its discretionary jurisdiction should be exercised in favour of an applicant in a matter in which the public interest also is concerned, must must [sic] be told all the relevant facts. If an applicant is the subject of a foreign State and is precluded by his municipal law from giving the necessary information to the court, that is his misfortune."

Chemie might have some remedy at the hands of its own government for any loss it can place at her door, but this of course is beyond our help. We merely note that when Switzerland takes action of the character here involved, which she deems beneficial to herself and her nationals as a whole, the disadvantage caused a particular national in litigation abroad is fairly left where the law of the forum places it.

We have considered an alternative solution: that is, to permit the case to go to trial without the unproduced papers, as was requested and denied in *Steamship "Antilla" and Other Vessels*, *supra*, with possible action, because of failure to produce, to await eventualities. If Chemie were unable to show the absence of enemy taint, or failed in

other respects to prove its case, judgment would be rendered for the Custodian on the merits. And if Chemie did make out its case but in the court's view the unproduced documents might if available lead to a different result, the court could then dismiss if the failure to produce persisted. But we think the District Court was not required to adopt this alternative. Since dismissal was within its powers we should not without strong reasons disapprove the manner in which it exercised control over litigation of which it bears the heaviest burden. Years have been consumed in preliminaries and in efforts to obtain full discovery as ordered. The District Court has become thoroughly acquainted with the factors which led to its decision. We cannot say it has abused its discretion or acted unjustly, or that its failure to adopt some other possible course constitutes reversible error. We add in this connection that not only production, but production before trial, is important; for the Custodian should have the benefit of discovery for cross-examination and preparation.[16] Moreover, the alternative suggested, with no definite conclusion in sight, would be a very unsatisfactory way of proceeding with a long trial.

One modification, however, we deem advisable, namely, that dismissal of the complaint with prejudice shall not become effective until six months after the receipt by the District Court of the mandate of this court in this case, and not then if within such period discovery is made as ordered.[17] This will afford another opportunity to bring the case on for a trial and decision on the merits.

Affirmed with modification.

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[16] This would be so even were the court to refer the matter to a Special Master in order to save some of its own time.

[17] We speak of discovery in general terms, since there is no reason to think that the District Court will require actual production in the United States if other arrangements, such as for inspection or copying in Switzerland, can reasonably be made.

[fol. 2041] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12140—April Term, 1955.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC., Appellant,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., Appellees.

Appeal From the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Fahy and Danaher, Circuit Judges.

JUDGMENT—June 30, 1955

This Cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed, provided, however, that if within six months after the receipt by the District Court of the mandate of this Court in this case discovery shall be made as required by the District Court, then the order dismissing the complaint shall be vacated by the District Court.

Dated: June 30, 1955

Per Circuit Judge Fahy.

[fol. 2042] [File endorsement omitted]

In United States Court of Appeals, for the District of Columbia Circuit

No. 12,140—April Term, 1955

Societe Internationale pour Participations Industrielles et Commerciales S.A., etc., Appellant,

v.

Herbert Brownell, Jr., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., Appellees.

Before: Edgerton, Chief Judge, Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, in Chambers.

Order Denying Petition for Rehearing in Banc—September 1, 1955

Upon consideration of appellant's petition for a rehearing in banc, and of appellees' memorandum in opposition thereto, it is

Ordered by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Circuit Judges Prettyman and Bazelon did not participate in the foregoing order.

[fol. 2043] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,140—October Term, 1955

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC., Appellant,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., Appellees.

Before: Wilbur K. Miller, Fahy and Danaher, Circuit Judges, in Chambers.

ORDER STAYING MANDATE—October 7, 1955

Upon consideration of appellant's motion to extend the stay of the mandate herein pending application to the Supreme Court of the United States for a writ of certiorari, of appellees' memorandum in opposition thereto, and of appellant's statement regarding appellees' memorandum, it is

ORDERED by the Court that the issuance of the mandate of this Court in the above-entitled case be, and it is hereby, stayed to and including November 1, 1955. No further stays of issuance of the mandate of this Court will be granted.

Dated: October 7, 1955

Per Curiam.

[fol. 2044] IN UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13,460, 13,527—April Term, 1956

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., Appellant,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, etc., et al., Appellees.

Before: Edgerton, Chief Judge, in Chambers.

ORDER CONSOLIDATING CASES—September 10, 1956

Upon consideration of appellant's motion to consolidate the above cases and it appearing that appellees consent thereto, it is

ORDERED that the above cases be, and they are hereby, consolidated for the purposes of filing briefs, filing a single joint appendix and for hearing.

Dated: September 10, 1956.

[fol. 2045] IN UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13,460, 13,527—April Term, 1956

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., Appellant,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, etc., et al., Appellees.

Before: Edgerton, Chief Judge, in Chambers.

ORDER INCORPORATING THE RECORD, ETC.—September 10, 1956

Upon consideration of appellant's motion to make the record in case No. 12,140, *Societe Internationale Pour Participations Industrielles et Commerciales, S.A., etc.* v. *Brownell et al.*, a part of the record on this appeal, and it appearing that appellees consent thereto, it is

ORDERED that the record in case No. 12,140 be, and it is hereby incorporated and made a part of the records in the above appeals.

[fol. 2046] IN THE UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13,460 and 13,527

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., Plaintiff,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, etc., et al., Defendants.

Appeals from the United States District Court
for the District of Columbia

AFFIDAVIT OF EDMUND WEHRLI—Filed February 11, 1957

Confederation of Switzerland)
Canton of Zurich) To wit:
Consulate General of the United States of America)

I, Edmund Wehrli, being first duly sworn, on oath depose and state that I am counsel in Switzerland for the plaintiff in the above entitled proceeding; that I have frequently conferred with John J. Wilson, whose firm is American counsel for the plaintiff and I am generally familiar with the proceedings leading up to the consolidated appeals, and I also have knowledge of certain events in Switzerland in relation to this case; that on October 9, 1956, the Swiss Federal Attorney, acting upon the erroneous conclusion that the refusal of the District Court to extend the time allowed for the production of the Sturzenegger records and the entry of a dismissal based thereon were final and not reviewable or subject to change, reversal or modification, lifted his impounding order of June 15, 1950 by an order dated October 9, 1956, copies of which, in the original German text and an English transla-

tion, are annexed hereto, marked, respectively, Exhibits A [fol. 2047] and B; that, at the same time, the Swiss Federal Attorney correctly informed the Sturzenegger Bank that it was still bound to the provisions of the economic espionage (Art. 273 of the Swiss Penal Code) and the banking secrecy (Art. 47 of the Bank Law) laws, and that its right to reveal its records remained as before within the framework of such laws.

In other words, the aforesaid laws applied to the records of the Sturzenegger Bank before the impounding order was issued and after it was lifted, as well as during the existence of such order, but while the impounding order was in effect, it was the same as though there were a physical seizure of its records by the Swiss authorities in that the Bank was not at liberty to release any of them without the express authorization of the authorities. Even then, a possible violation of the secrecy laws was not waived or forgiven by the Swiss Federal Attorney when he authorized the release of the particular records. While at the present time, the Bank is physically free to pass out any document it chooses without being under the limitation of an impounding order, it is still faced, as it always has been and will be, with the *bona fide* restriction that it may be proceeded against both criminally and civilly if it discloses a secret which comes within the purview of the aforesaid laws and which has not been waived, or for whose disclosure a consent has not been, or may not be given, by any party interested therein.

By the foregoing, I am endeavoring to indicate that for all practical purposes in Switzerland, the situation remains unchanged by the lifting of the impounding order. Indeed, the Sturzenegger Bank will doubtless be vigilantly watched by the authorities in view of the occurrences of the past several years so that it would be at great risk for the Bank to release any records whose secrecy is in doubt, or not appropriately waived, except through the intervention of a judicial proceeding in Switzerland. Such [fol. 2048] a judicial proceeding could be in assistance to letters rogatory, or it could be an arbitration court such as I am informed the intervenors in the above captioned action are presently proposing to Special Master Hughes.

The Sturzenegger Bank ceased the production of its documents about the time that the District Court refused to grant plaintiff any additional time, but recently the Bank has resumed its efforts and I am informed that over twenty-five thousand (25,000) documents have recently been airmailed to plaintiff's American counsel, and more are expected to be forwarded in the near future.

s/ Edmund Wehrli

Confederation of Switzerland)
Canton and City of Zurich) ss
Consulate General of the)
United States of America)

Subscribed and sworn to before me this 30th day of January, 1957, by Edmund Wehrli

s/ John W. MacDonald, Jr., Vice Consul of the United States of America at Zurich, Switzerland duly commissioned and qualified.

Service No. 306
Tariff Item No. 24
Fee Paid: U. S. $2.00
Local CY. equiv. Sw. Fr. 8.80

SEAL

[fol. 2049] EXHIBIT B TO AFFIDAVIT

SWISS FEDERAL ATTORNEY
BERNE

ORDER

In the suit of *Internationale Industrie- und Handelsbeteiligungen A/G., Basle (Interhandel)* against the Attorney General of the United States in Washington regarding the release of the assets vested in the United States as enemy property, the District Court in Washington ordered on 5th July, 1949 the production of the records and books of the *private banking house H. Sturzenegger & Co., Basle*. As the danger existed that production of these records would infringe the economic espionage laws

(art. 273 of the Penal Code) and the banking secrecy laws (art. 47 of the Federal Law of 8th November, 1934 relating to banks and saving-banks), the Federal Attorney impounded on 15th June, 1950 all the records and books of the private banking house H. Sturzenegger & Co. which the American judge ordered to be produced. On 3rd August, 1956 the District Court in Washington finally refused to extend the time allowed for the production of the Sturzenegger records and dismissed the Interhandel claim because the order for the production of these records was not complied with.

By reason of the circumstances the Federal Attorney takes into consideration:

that due to the dismissal of the claim by the American Court, the order to produce the records and books of the private banking house H. Sturzenegger & Co. is no longer applicable, that therefore the presuppositions for the mentioned preventive measures do no longer exist,

that therefore the measures taken against the private [fol. 2050] banking house H. Sturzenegger & Co. are to be lifted with the express reservation that measures of this kind or of a similar kind may be ordered if they should become necessary at a later date.

The Federal Attorney orders:

1. The impounding order on 15th June, 1950 of the records and books of the banking house H. Sturzenegger & Co., which were ordered to be produced by the American judge, is lifted with immediate effect.

2. the private banking house H. Sturzenegger & Co. in Basle to be advised accordingly.

THE FEDERAL ATTORNEY

Berne, 9th October, 1956.

For information copies to:

Federal Political Department.
Swiss Compensation Office.

[fol. 2051] IN UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13,460 and 13,527

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., Plaintiff,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, etc., et al., Defendants.

Appeal from the United States District Court for the District of Columbia

AFFIDAVIT OF PEIDER KONZ—Filed February 11, 1957

District of Columbia, ss.:

I, Peider Konz, being duly sworn, state that I am a Swiss attorney employed by the law firm of Whiteford, Hart, Carmody & Wilson, counsel for appellant in the above-entitled action. I have given special attention to the Societe Internationale case in association with John J. Wilson of that firm and am familiar with many of the details thereof, in particular with appellant's past and present efforts to bring about discovery of the records of the banking house H. Sturzenegger & Cie.

I have checked the 191,841 records received by our firm from the Sturzenegger Bank in connection with the above-entitled civil action as indicated in my affidavit of October 19, 1953 and in affidavits of John J. Wilson of June 20, 1956 and July 2, 1956.

I have further examined 26,663 records of the Sturzenegger Bank, together with the lists accompanying them, which were received by this office on or about January 25, 1957 as the result of continuing efforts of appellant and the Sturzenegger Bank.

[fol. 2052] I have found that these 26,663 records, which bring the total of the Sturzenegger records now available for discovery to 218,600, are addressed to or received from, or pertain or relate to the following additional persons, corporations, firms or accounts:

Morgan & Cie, Paris;

Deutsche Landerbank A.G., Berlin;

Sekretariat "C";

Dr. Hans Sturzenegger;

A. Hofmann & Co., A.G., Zurich;

Dr. E. Friedrich, Zurich;

Leukon A.G., Zurich;

Verrechnungs-Konto;

Aktien-Verrechnungs-Konto A;

Aktien Verrechnungs-Konto B;

Aktien Verrechnungs-Konto C;

Aktien Verrechnungs-Konto D;

Akfien Verrechnungskonto E;

Zinsen-Verrechnungs-Konto;

N-H Verrechnungs-Konto;

Farben-Aktien-Umtausch Konto;

Bank of the Manhattan Co., New York;

The National City Bank of New York, N.Y.;

"Defag" Deutsche Farben-Handelsges., Waibel & Co., Shanghai; and

Casa dell'Indanthren S.A. Milan.

P. K.
Peider Konz

Subscribed and sworn to before me this ..... day of February, 1957.

Notary Public, D.C.

[fol. 2053]

IN UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13460 and 13527

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC., Appellant,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., Appellees.

Appeals from the United States District Court for the District of Columbia

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Mr. John J. Wilson, with whom *Messrs. Roger J. Whiteford, Philip S. Peyser* and *Duane G. Derrick* were on the brief, for appellant.

Mr. David Schwartz, Attorney, Department of Justice, with whom *Messrs. George B. Searls, Sidney B. Jacoby, Paul E. McGraw* and *Ernest S. Carsten*, Attorneys, Department of Justice, were on the brief, for appellees.

Before WILBUR K. MILLER, FAHY and DANAHER, *Circuit Judges*.

OPINION—Decided April 11, 1957.

PER CURIAM: We consolidated appeals from orders of the District Court which had (1) refused to give appellant (plaintiff) additional time within which to obtain and produce for inspection records of the banking house, H. Sturzenegger & Cie of Basle, Switzerland, not previously obtained and tendered to the appellees (Government) [fol. 2054] and (2) dismissed plaintiff's complaint with

prejudice. Various aspects of the litigation were earlier treated by the District Court,[1] and by us.[2]

We provided that dismissal of the complaint with prejudice was not to become effective until six months after the receipt by the District Court of our mandate, and not then, if within that period discovery had been provided as ordered. Our mandate was received by the District Court January 24, 1956, and by July 24, 1956, plaintiff had obtained and assembled in Washington many thousands of Sturzenegger records. Plaintiff sought an extension of time from the District Court and submitted a proposed discovery plan which had been approved by the Swiss Government. It was contemplated that full discovery was to be achieved by permitting an independent investigator, a neutral, to inspect the Sturzenegger files to ascertain which of certain unknown remaining records were relevant. It was further contemplated that production of such records could be assured by letters rogatory or by copying. The District Court declined further relief, and on August 3, 1956, plaintiff's complaint was dismissed with prejudice and on August 21, 1956, plaintiff's motion to vacate the order of dismissal was denied.

That plaintiff and its counsel patiently and diligently sought to achieve compliance with the District Court's discovery order is not to be doubted. There is no question of lack of diligence, indeed plaintiff is quite right in its suggestion that delays in the disposition of the case were "inherent in its nature." Basically, however, the [fol. 2055] problem was summed up adequately by Chief Judge Laws, thus:

> ". . . . At the end of more than seven years now, I just find no assurance whatever that these papers that we have ordered to be produced will be pro-

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[1] Societe Internationale, Etc. v. McGranery, 111 F. Supp. 435 (D.C. D.C.).

[2] Societe Internationale, Etc. v. Brownell, 96 U.S. App. D.C. 232, 225 F. 2d 532 (D.C. Cir. 1955), *petition for rehearing en banc denied* Sept. 1, 1955, *cert. denied*, 350 U.S. 937 (1956), *petition for rehearing denied*, 350 U.S. 976 (1956).

imposed upon them with regard to the traditional laws of secrecy existent in the Confederation of Switzerland itself.

I want to say that this matter of Swiss secrecy is no figment of a litigant's imagination; it is no excuse which is conjured up for the purpose of attempting to defeat the American processes of justice. This matter of secrecy is a very serious problem with the Swiss, and it is one which confronts the Stürzenegger firm today in this very instance. It can very well be said by Mr. Schwartz as he has said it in his motion papers, how is it that the plaintiff is going to take all the risk of violating the Swiss secrecy laws, and how is it the Stürzenegger firm which Mr. Schwartz emphasizes as the allegedly legal culprit in this matter, hides behind the veil of secrecy?

I said at one point, in my memorandum in response to that contention, that one answer to that is that one person will take a risk where another one won't, but that might be a whimsical excuse. The real reason is naturally more fundamental.

The plaintiff is a holding company. The plaintiff does not deal with anyone but its own [fol. 208] is the plaintiff here and knows and has been told that in order to maintain this action here it must comply literally with every requirement of this court which is imposed upon it. And so the corporate plaintiff in this case, for itself and for its wholly-owned subsidiaries, has assumed all the risk and all the condemnation that may flow from the violation of the Swiss Secrecy Laws, but it is going to answer the questions of this Court and it is going to produce the records.

On the other hand the Stürzenegger firm is a private banking firm, the successor of Greintert & Company, a concern which has been in business in Switzerland for thirty years, and Mr. Stürzenegger, the partner with unlimited responsibilities of that firm, is a man less than fifty years of age, who presumably will be in business in Switzerland for another twenty years, and who must maintain the position that goes with that of a banker in Switzerland, or lose his reputation and everything that goes with it.

And so in Switzerland there are two very important secrecy laws. One is Article 273 which has to do with

economic exploitation, and which amounts to simply disclosing any business information to a third party, and it is extraterritorial in its effect, and it means that wherever it is violated by a Swiss it is a crime against Switzerland.

In addition to Article 273 there is Article 47 of the [fol. 2079] Banking Laws which is directed particularly to banks, public and private, and with respect to the status as a banker in Switzerland it is Mr. Sturzenegger's feeling that he will not, with propriety or safety, disclose his records.

Now, it isn't said that glibly, and it isn't said with any intention to be disrespectful to this Court. The way it developed, on the first day of the resumption of the testimony, last January, out of a clear sky Mr. Schwartz asked the question. Mr. Sturzenegger said, "I think I am not in a position to grant the inspection."

In the affidavit which Mr. Sturzenegger has filed in this proceeding, he says that he feels that he is obliged to decline. Frankly, Mr. Sturzenegger at this moment has not reached a final conclusion that he will decline. He is struggling with a tremendously serious question to a Swiss banker, and this issue of Swiss privilege shaped itself up only since his arrival in this country on January 6 of this year, and Mr. Sturzenegger has not been back to Switzerland since his arrival on that date. And he learned on the 9th of January, much to his surprise and much to the surprise of a Swiss lawyer who accompanied him at that time, from the lips of Judge Bailey what the American attitude is toward Swiss secrecy when it is invoked in an American Court. And after that Mr. Schwartz filed this motion to require the production of the Sturzenegger records [fol. 2080] and, over in re; and we filed the cross-motion to be relieved of the production of the Sturzenegger records. And it is no secret to say to Your Honor that this is a tremendously serious problem to the plaintiff and to Mr. Sturzenegger, and it is the sincere desire of everybody to obey the orders of this Court, or certainly to seek to be excused from the rigid application of them in this kind of a situation.

Mr. Sturzenegger's attitude has not yet, as I say, finally become crystallized, and the moment of final determina-

tion has not been reached for the reason that the obligation of the plaintiff to produce the records of the Sturzenegger Company does not occur until thirty days after the conclusion of the Sturzenegger deposition. Thus the problem is still a serious one with Mr. Sturzenegger, who is endeavoring to resolve it consistent with the plaintiff's position in the case, and consistent with his own position in Switzerland.

Those are the preliminary things I wanted to say.

Taking up specifically, we find that Mr. Schwartz said that because of his suspicion that we would take this attitude, he asks Your Honor to compel the plaintiff to produce over here the Sturzenegger records. And we came in, not only to oppose that, but also to ask Your Honor under this provision of your memorandum which I read to Your Honor, to be excused from the production of the Sturzenegger records.

[fol. 2081] Our position with respect to the production over here of the Sturzenegger records is that you are called upon to require us to bring across the Atlantic hundreds of tons of papers.

According to Your Honor's order, Your Honor has required us to produce 450 files and 55,000 documents from the Sturzenegger records. Your Honor got that data from the reports of the Swiss Compensation Office which had investigated both I. G. Chemie and Sturzenegger, wherein it was stated that the examiner of the SCO (Swiss Compensation Office) particularly looked into 450 dossier and 55,000 documents, and you adopted that description in your order.

The affidavit of Mr. Sturzenegger shows—and this has been misunderstood by Mr. Schwartz in his reply memorandum—that those 55,000 documents which had been taken out by the SCO were put back in their respective files. They were not simply 55,000 documents contained in those 450 files but they were taken out of files and many documents were not taken out of those same files, and there is no list available of what the SCO took and looked at. When the SCO brought their records back, these 55,000 papers were put back into the files and into the bundles, so that it is impossible today for anybody to go to the Sturzenegger files and say these are the 55,000 documents.

We can say, if you will look on this side of the wall, or [fol. 2082] on that side of the wall, or in that room, or in this room, or in that cabinet, those 55,000 documents are amongst those papers.

And so if Your Honor would order us, leaving aside all other questions, to produce the Sturzenegger records in this country, it would be practically necessary to empty the file rooms of a thirty-year business to produce in this courtroom, or in this city, among others, the documents which you have designated—a tremendous, collossal (sic) task, also required of a going business, if that is of any importance.

And so we oppose, separately and apart from the cross-motion which we filed, we separately oppose the motion to produce the Sturzenegger records over here upon the grounds, among others, of the tremendous and almost, if not entirely, impossible task which will be cast upon us to bring those records 4,000 miles.

If the Court please, in this opposition as well as in our independent motion asking Your Honor to relieve us of the requirement of your order to produce the Sturzenegger records, we call attention to the serious problems of Swiss secrecy; we call attention again to the fact that we do not have control of the Sturzenegger records.

When we come to the question of control, Your Honor will remember there are three nouns in the ruling: Possession; custody; and control. I think that we might say, and [fol. 2083] without inviting violent debate, that in this case if the questions of possession and custody are factual questions it is clear that we do not have the possession or the custody.

The two businesses, while neighbors to one another on the corner of the street, are operated from independent houses and except for infrequent occasions when the file of one may have been in the presence of the other, the files of the plaintiff are kept in the business offices of the plaintiff, and the files of Sturzenegger and Company are kept in the business offices of Sturzenegger and Company.

And so on the question of possession and of custody, I think it can be said, without much invitation to debate, that there isn't any problem.

The question arises, if Your Honor pleases, in the matter of the third word, whether the records of Sturzenegger and Company are in the control of the plaintiff.

It was argued that Your Honor made a prima facie finding last year that they were in the control. Your Honor remembers my vigorous opposition to any such probable conclusion on the Court's part, and I am grateful to Your Honor for what I take to be the suggestion in Your Honor's memorandum, that if this matter was not obeyed that we might again have an opportunity to present it to you. This is the occasion upon which we are availing ourselves of that opportunity.

[fol. 2084] Now, on the question of the control by the plaintiff of this separate banking institution of Sturzenegger and Company, I pointed out to Your Honor a few moments ago, because I am sure Your Honor's memory cannot carry too many of these details from last year—about this time, incidentally,—that the Sturzenegger Company is a partnership in which Mr. Hans Sturzenegger is the partner with unlimited responsibility and in which a separate Swiss corporation known as Industrie Bank, unlike the practice in this country, is a limited partner, and I. G. Chemie has up to last August held a position in the firm which has been variously described as a sleeping participation, a sleep-stake; a sleeping partner.

The partnership contract is amongst the records of this Court and when one examines it one finds a very unique situation, not an orthodox, typical American down-the-line partnership agreement. And we have the opinion of respectable and responsible and high grade Swiss lawyers that the position of I. G. Chemie in the Sturzenegger partnership was not that of a partner but was that of an investor with certain prerogatives.

Now, the evidence of the parntership (sic) is fully and clearly outlined in a sequence of agreements which, for the purposes of this point, take us back to the 1941 agreement, carry us through unimportant modifications until we get to perhaps more important modifications as they existed [fol. 2085] in 1943, and as they existed up to August of last year.

[fol. 2086] TRANSCRIPT OF HEARING BEFORE CHIEF JUDGE LAWS, JANUARY 12, 1951

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Mr. Wilson: * * *

[fol. 2087] I want to say to the Court that I have not contested the question of relevancy. Therefore, any reference to the master to determine the question of relevancy is somewhat beside the point.

We are dealing here not with the question of relevancy, we are dealing here with the question of possession, custody, or control within the four corners of the rule.

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[fol. 2088] TRANSCRIPT OF HEARING BEFORE CHIEF JUDGE LAWS, NOVEMBER 19, 1952

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The Court: Mr. Schwartz, I did not understand that Mr. Wilson, at least at this juncture, has ever raised any question about the materiality of these papers. His argument yesterday was that he was quite anxious to get them himself.

Mr. Schwartz: That is perfectly correct, Your Honor. He has always conceded relevancy.

The Court: I frankly do not believe—I have never had any doubt about the pertinency and importance of the papers, and I think he concedes it now. What you have said so far certainly does point it up.

I am perfectly willing to hear you on it as far as you want to go, but if there is no contest as to it——

Mr. Schwartz: Well, sir, I will be glad to stop, because in a sense——

The Court: I do not want to cut you off, because this is an important matter, and it has reached what might be a vital point. I want to give you all the hearing you want. If there is any issue about it, I will hear you ad infinitum, [fol. 2089] but I did not think there was.

Mr. Schwartz: There is no issue on relevancy——

The Court: Or materiality.

Mr. Schwartz: Or materiality. But vitality, Your Honor, indispensability, to our case, on that we take the position that these papers are indispensable to a fair hearing for

us. Or put it another way: That plaintiff cannot prove its non-enemy status except and unless we have these papers.

Do you see my point, Your Honor?

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[fol. 2090] TRANSCRIPT OF HEARING BEFORE CHIEF JUDGE LAWS, NOVEMBER 24, 1952

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Mr. Wilson:

[fol. 2091] In my narrative of the general picture of the Chemie-Greutert-Sturzenegger-Basle facts I alluded to one company, Industriebank. I want to go back and I want to refer to four of them, because those are the concerns which comprise the Basle circle.

By the way, this phrase "the Sturzenegger circle" is one of the gentlemen of the Department of Justice. It is the Basle circle, or it is the Chemie circle. Emphasis is on Sturzenegger for obviously technical reasons. He is the whipping boy of the Government's case.

There were four corporations, Swiss corporations, that revolve around the so-called Chemie circle. I mentioned one to you, Industriebank. Another is called Rigidor; another Perpetua; and a fourth whose French name goes Societe Pour Participations et Depots—it is spelled as it sounds, but its abbreviated name is Sopadep. Those are the four Basle circle companies. They are the companies where individuals, Swiss individuals, owned shares.

[fol. 2092] Those are the companies which Mr. Schwartz refers to with great mysticism, and insinuations, and innuendos.

Those are the companies with the cross-options, and the right to purchase upon death; this closely-knit group of Swiss companies owned by Swiss people, the details of which were set forth minutely in the Swiss Compensation Office reports and about which Mr. Sturzenegger was examined at great length and confirmed the accuracy of the Swiss Compensation Office's description of the stock ownerships and the cross-holdings.

Now, these are independent corporations. These corpo-

rations are not owned by I. G. Chemie, nor do they, except in one instance, own a portion of I. G. Chemie.

These corporations are not owned by the Greutert-Sturzenegger partnership, and except in one instance they do not own a part of the Greutert-Sturzenegger partnership. These are independent Swiss stock corporations.

If the Court please, I must further digress a moment in this connection to speak about the stock setup, the capitalization of I. G. Chemie. I have not given you that and I am not sure that you have ever had it from any other source.

At the time of Pearl Harbor the Chemie capitalization [fol. 2093] consisted of 100,000 preferred shares and 250,000 common shares. Part of the common shares were 50 per cent paid in; the other part of the common shares were 100 per cent paid in. But each share, whether it be common or preferred, had a right to vote, and also regardless of whether the full assessment had been paid or not.

So actually there were 350,000 voting shares outstanding in the I. G. Chemie capital at the time of Pearl Harbor.

Mr. Schwartz has told you how important it is to him to find out from the so-called secret files of Sturzenegger who owned the shares of Chemie, so that he could endeavor to prove, says he, who controlled Chemie.

These gentlemen, if the Court please, from the Department of Justice, complicate matters in their own interest to prove their own point. The answer is very simple. If there are 350,000 outstanding votes in Chemie, 175,001 would control.

Now, Your Honor, there are three well-known blocks of Chemie shares, which aggregate 206,000 shares, and which in and of themselves put the management in power and continued the management in power. Those 206,000 shares were made up of the following: This whole block of preferred shares is owned by Basle.

[fol. 2094] At the present time, and for several years, the whole 100,000 shares is owned by Industriebank.

During the war years, and for sometime prior thereto, 4,000 of it was held by Sopadep, and 60,000 by Industriebank. They are with the 100,000 block of preferred shares.

Now, there has been no investigation of this separate corporation known as Industriebank, by the Office of Alien

Property, or of Sopadep, which previously owned a portion of this 100,000 shares. They are in the same situation there as if I had gone into a transaction with the X Bank in some sort of a joint enterprise, and if later on I should be a party litigant with Your Honor over some phases of that joint enterprise. I cannot be required to produce the papers of the X Bank. Subpoenas and other methods of discovery directed to independent third parties is the proper way to pursue that.

The mere fact that part of the evidence in the case reposes in the possession of a third party is no excuse to require the plaintiff to get them. Nor is it any reason to strike down the plaintiff when the lawyer for the United States stands up here and says that those papers are indispensable.

* * * * * * *

[fol. 2095] The Court: Just before you take those up—you do take the position that whether these papers are indispensable or not, they certainly have some likelihood of bearing on this case?

Mr. Wilson: I would say as a general proposition, yes, they are relevant.

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[fol. 2096] In the United States District Court, for the District of Columbia

Civil No. 4360-48

Societe Internationale Pour Participations Industrielles et Commerciales, S. A. etc., Plaintiff,

v.

Herbert Brownell, Jr., etc., et al., Defendants.

Plaintiff's Designation of Record—Filed July 24, 1957

The Clerk of this Honorable Court will please prepare a record of the following and transmit same to the United States Court of Appeal, for the District of Columbia Circuit:

Document	*Filed On*
* * * * * * *	
[fol. 2097]	
(15) Transcript of depositions of Hans Sturzenegger, Vol. I. through XII	Feb. 25, 1949
* * * * * * *	
(34) Deposition of Hans Sturzenegger, transcript of Vol. XIII through LVII	October 26, 1950
(35) Sturzenegger deposition; exhibits 1-798 (defendant), 1 through 91 (plaintiff); stipulation of counsel	October 26, 1950
[fol. 2098]	
(36) Motion of Plaintiff for discovery, etc.	Jan. 10, 1949
(37) Motion of Defendants under Rule 34 for production of documents; exhibits A, B, C, D, and affidavit of David Schwartz	Jan. 18, 1949
(38) Two exhibits attached to memorandum in support of Defendants' motion and affidavit	Jan. 18, 1949
* * * * * * *	

[fol. 2099] Respectfully submitted,

Whiteford, Hart, Carmody & Wilson, By John J. Wilson, Attorneys for Plaintiff.

Of Counsel: Peider Konz

[fol. 2100] In United States District Court

Testimony of Hans Sturzenegger, on Direct Examination by Mr. Schwartz

* * * * * * *

Q. Now, I suppose the 110 account books of the firm of [fol. 2101] Greutert are probably more complicated, or they are certainly greater in number,

A. You see, there is a greater number because it began earlier, the whole thing. And then there are, of course, much more individual transactions, because as you are well aware, many, many of the banking transactions of I. G. Chemie were carried through by the Greutert firm. Then we had a lot of clients. Whereas, I. G. Chemie, because she is not a firm with a banking character, has no clients. With us the current business of course was——

Q. So you naturally required more account books. You used them up at a greater rate?

A. No doubt: yes.

* * * * * * *

[fol. 2102] By Mr. Schwartz:

Q. But in the course of answering any questions I might ask, do I understand that you would not answer if the answer involved any knowledge that you had from your firm, through your activities in your firm?

A. Now, how's that?

Q. Let's just go on with questions, and you take as much time as you like between them to decide whether you want to claim the privilege or not.

Mr. Wilson: I can answer your question, Mr. Schwartz.

Mr. Schwartz: All right.

Mr. Wilson: And the answer is simple. Every question which seeks an answer which will violate, in our judgment, the banking privilege, will be declined.

Mr. Schwartz: All right. Then, let's have some questions and we will see whether they will be answered or not.

By Mr. Schwartz:

Q. Do you know the nature of the business of Maria-Stiftung?

A. No, I do not recall that. I told you already before.

Q. Do you know the nature of the business of the Michelangelo-Stiftung?

A. Yes, I do.

[fol. 2103] Q. What is it?

A. I recollect it. Well, it is just the administration of certain property of an individual, but I am not—as long

as I have not made sure this point, I do not feel as a banker entitled to disclose it.

Q. You know the name of the individual, but you claim the privilege?

A. Yes. I may, perhaps, give additional, this information, that no German is involved.

* * * * * * *

[fol. 2104] By Mr. Schwartz:

Q. Mr. Sturzenegger, we were just on Plaskon.

A. Yes.

Q. And you had mentioned it and so I pointed out to you page 18 of the investigators' report.

A. Yes.

Q. And you have read that in the German, have you? It was just two sentences.

A. Yes.

Q. It says in my translation:

"Plaskon Co. Inc. NY (USA).

[fol. 2105] "I. G. Farbenindustrie, I. G. Chemie and the New York gentlemen carried on transactions in 1941 concerning this sub-participation of General Aniline & Film Corporation, New York. This was also a case of a liquidation measure."

Does that refresh your memory as to the connection of Plaskon?

A. Not very much, but might I first tell you that in my opinion the translation is not quite correct?

Q. Oh? Will you help us? I will show you mine and you point out the errors for us.

A. It says "carried on transactions," whereas the German expression is "verhandelten."

Q. That should mean?

A. That they negotiated. It is——

Q. Let's assume—for purposes of your testimony right now, let's say that it is not "carried on transactions," but it is "negotiated."

A. Yes. They were negotiating.

Q. "Were negotiating" or "negotiated."

A. Yes. Just to be precise.

Q. Well, then, obviously you remember that there were negotiations as against some—— No, no; I'm sorry. It's only the translation you helped us on. Do you remember anything about these negotiations?

A. Nearly nothing. I remember quite well the name [fol. 2106] of Plaskon, and I believe to remember that, as I told you already, certain stock of—certain shares—of this Plaskon Company were owned by G. A. F. And I have a very vague recollection that during the time, the period mentioned, there were negotiations or, how should I call it? Perhaps exchanges of letters or so about this matter. But I do not remember the reason. It's more guessing, if I might say, that perhaps a possible sale of this stock of the Plaskon Company was considered and perhaps carried through. According to my memory I think something like that was involved. But what it was exactly I do not recollect and how the matter was treated, how it was carried through, I do not recollect. But there might have been exchanges of letters or negotiations.

Q. Sale from whom to whom?

A. Sale——?

Q. Proposed or carried through. I don't mean that it actually took place.

A. I think sale from G.A.F. to—I don't know. Maybe that—but I want to state it's more or less guessing—maybe that I. G. Farben too had at that time still a stock interest whom they wanted to dispose of.

Q. So it would be a sale from Farben to someone else?

A. About that I am not at all sure. That's just my vague recollection I am giving to you now.

[fol. 2107] Q. Do you perhaps remember whether Chemie bought anything as a result of these negotiations?

A. Not to my recollection, sir.

Q. Or that it sold anything?

A. I. G. Chemie had the shares not—I do not remember that I. G. Chemie had Plaskon shares. Maybe they have acted as intermediary just to wind up the situation or to—that I do not——

Q. As intermediary for the owner? As nominee for the owner?

A. That I do not recollect.

Q. Nominee for Farben perhaps?

A. I don't think they were nominees in this respect.

Q. But they might have been an intermediary?

A. In the negotiations. That might have been the case.

Q. You mean intermediary just in negotiations as some one who conveys messages back and forth, or an intermediary in the ownership of some stock?

A. Again only according to my recollection, more in exchanging letters.

Q. More in what?

A. In the way of exchanging letters or so. More or less messages.

Q. In the sense of transmitting communications?

[fol. 2108] A. Yes.

Q. Perhaps because communication was difficult directly between Farben and New York?

A. Well, that's all guessing, and I wouldn't like to make a statement which is not in accordance with the facts. That's really all what I remember.

Q. I see. Well, in view of that, I would like to renew my request that you refresh your memory as to these negotiations by calling for your documents and letting us inspect them.

Mr. Wilson, you will want to answer that. You now have a form answer to that question, don't you?

Mr. Wilson: I would include this within the scope of my declaration this morning,——

Mr. Schwartz: And that is that?

Mr. Wilson: —and decline.

Mr. Schwartz: You decline?

Mr. Wilson: Yes.

Mr. Schwartz: To produce and to have the witness refresh his memory by calling for his documents?

Mr. Wilson: That's right.

Mr. Schwartz: So you decline both letting us inspect the documents and you decline to permit the witness to refresh himself by calling for documents from Switzerland?

Mr. Wilson: Yes. For the purpose of this record I will [fol. 2109] say that I acquiesce in your phrasing of my position.

[fol. 2110] SUPREME COURT OF THE UNITED STATES

No. 348—October Term, 1957

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., Petitioner,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, and IVY BAKER PRIEST, Treasurer of the United States.

ORDER ALLOWING CERTIORARI—Filed October 14, 1957

The petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. Counsel are invited to discuss, among other things, the power of the District Court to dismiss, and the propriety of its dismissal, of petitioner's complaint, under Rule 37 (b) (2) of F.R.C.P., for *failure* to obey its order, for production of documents, issued under Rule 34 of F.R.C.P., in the absence of evidence and of finding that petitioner "refuses to obey" such order.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.

SUPREME COURT OF THE UNITED STATES

No. 348, October Term, 1957

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ETC., Petitioner,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, and IVY BAKER PRIEST, Treasurer of the United States.

ORDER OF SUBSTITUTION—January 6, 1958

On Consideration of the motion to substitute William P. Rogers, Attorney General of the United States as party respondent in the place and stead of Herbert Brownell, Jr., resigned, in the above case,

It Is Ordered by this Court that the said motion be, and it is hereby, granted.